TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ, PETITIONER,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 10, 1956

CERTIORARI GRANTED NOVEMBER 13, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ, PETITIONER,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division	1	1
Complaint for declaratory judgment	1	1
Motion for a temporary restraining order	5	3
Order to show cause	6	4
Order granting temporary restraining order	7	4
Restraining order and injunction	8	5
Return to order to show cause	9	5
Answer	11	7
Findings of fact and conclusions of law	14	9
Judgment	19	12
Notice of appeal	21	13
Bond (omitted in printing)	22	
Designation of record (omitted in printing)	24	
Clerk's certificate (omitted in printing)	25	
Proceedings in U.S.C.A. for the Ninth Circuit	26	14
Statement of points	26	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D.C., JAN. 17, 1957

—3419-9

	Original	Print
Order submitting and granting motion to proceed on typewritten record (omitted in printing)	27	
Minute entry of argument and submissison (omitted in printing)	28	
Order directing filing of opinion and filing and recording of judgment	29	14
Opinion, Tolin, J.	30	15
Judgment	33	18
Clerk's certificate (omitted in printing)	34	
Order allowing certiorari	35	19

[fol. 1]

IN UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 33292

CLEMENTE MARTINEZ PEREZ, Plaintiff

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, Washington, D. C., Defendant

COMPLAINT FOR DECLARATORY JUDGMENT—Filed January 21, 1954

Comes now the plaintiff in the above entitled action and for cause of action against the defendant hereinabove named alleges as follows:

I

That the defendant hereinabove named is and has been at all times herein mentioned the Attorney General of the United States at Washington, D. C., and as such is the head of the United States Department of Justice.

II

That plaintiff has been, and at all times herein stated, is still being held in restraint and being denied his liberty by the defendant in that the plaintiff is confined to the Immigration Detention Quarters at San Francisco, California, in the said Northern District of California, Southern Divi-[fol. 2] sion thereof, and further that the defendant has ordered the plaintiff to be deported from the United States as an alien.

III

That the plaintiff is a citizen and a national of the United States and was born in the City of Smelter Settlement, County of El Paso, State of Texas, United States of America, on the 17th day of March, 1909. That a birth report, No. 5292, was filed on the 18th day of March, 1909, and

recorded in Book No. 2, at page 177, of the birth records of El Paso County. That he is the legitimate son of Clemente Martinez and Maria Perez, as evidenced by a baptismal certificate dated 20 September, 1928 and recorded in Book 11 of the baptismal records at page 27 of the Parish and Mission Santa Rosalia, at Smelter Settlement, El Paso, Texas, and further that the plaintiff is a resident of the City and County of San Francisco, State of California, and is presently residing therein.

IV

That plaintiff claims a right and privilege as a national and citizen of the United States and further claims the attending rights and privileges to remain in the United States and to enjoy all pertinent rights and privileges therein, and further that plaintiff alleges that defendant herein named has denied and still continues to deny said rights and privileges to the plaintiff on grounds that he is not a national and that the executory officials of the Department of said [fol. 3] defendant have denied and continue to deny the plaintiff such rights and privileges as a national and citizen upon the grounds that the plaintiff herein named is not a national and citizen of the United States.

V

That the plaintiff has exhausted his administrative remedies and has prosecuted this action pursuant to the provisions of Section 2201-28 U.S.C. and Section 1503-8 U.S.C. of the Nationality Act, for a judgment declaring the plaintiff to be a national and citizen of the United States.

WHEREFORE, plaintiff prays:

1: That the defendant herein or other proper representative, agents or officials of the United States Government be requested to appear and answer this Complaint.

2: That a time and date be set for hearing the evidence to be adduced on behalf of plaintiff and his witnesses.

3: That pending the hearing and determination of this action, the plaintiff be released from the custody of the Immigration and Naturalization Service and of the defendant,

and that plaintiff be allowed to remain at liberty under reasonable bond.

4: For a judgment of this Honorable Court, declaring the plaintiff to be a national of the United States.

5: For such other and further relief as may be meet and just in the premises.

[fol. 4] Clemente Martinez Perez, Plaintiff.

Duly sworn to by Clemente Martinez Perez. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

MOTION FOR A TEMPORARY RESTRAINING ORDER—Filed January 26, 1954

Comes now the plaintiff in the above entitled action by and through counsel of record, and moves this Court for a temporary restraining order.

The plaintiff, Clemente Martinez Perez, has filed an action for a declaratory judgment, on the 21st day of January, 1954. That said plaintiff is now detained by the Department of Immigration and Naturalization in San Francisco, California.

That a deportation order will subject said plaintiff to immediate deportation, and that Bruce Barber, Director of the said Department of Immigration and Naturalization, has given notice and has indicated that he will deport said Clemente Martinez Perez from the United States and out of the jurisdiction of this Honorable Court.

That if Clemente Martinez Perez is deported, he will be put beyond the jurisdiction of this Court and will be denied his day in Court and his right to be heard in the action No. 33293 now on file with the Clerk of this Court, determining

thereby the status and claim of Clemente Martinez Perez as a national and citizens of the United States.

This motion is filed pursuant to Rule 65.

Salvatore C. J. Fusco, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 6] In United States District Court

Order to Show Cause—January 28, 1954

Good Cause Appearing Therefor and upon reading the verified Complaint on file herein;

It is hereby ordered that Bruce Barber, District Director of the Immigration and Naturalization Service, San Francisco, California, appear before this Court on the 3rd day of February, 1954, at the hour of 9:30 A.M. of said day, to show cause, if any he has why a preliminary injunction should not be issued herein, as prayed for, and that a copy of this order be served upon the said Bruce Barber, District Director of the Immigration and Naturalization Service, San Francisco, California, by mail, and that a copy of the Complaint and this order be served upon the U.S. Attorney General, his representative herein.

Dated: January 28th, 1954.

Michael J. Roche, United States District Judge.

[File endorsement omitted.]

[fol. 7] In United States District Court

Order Granting Temporary Restraining Order—January 28, 1954

Good cause appearing therefor:

It is hereby ordered, adjudged and decreed by this Court that a temporary restraining order be issued against Bruce Barber District Director of the Immigration and Naturali-

zation Service, San Francisco, California, thereby enjoining him from deporting Clemente Martinez Perez from the jurisdiction of this Court, pending the issuance of a judicial decision on the Order to Show Cause now on file.

Dated: January 28th, 1954.

Michael J. Roche, United States District Judge.

[File endorsement omitted]

[fol. 8] IN UNITED STATES DISTRICT COURT

RESTRAINING ORDER AND INJUNCTION—February 3, 1954

It is hereby ordered, adjudged and decreed that the Director of Immigration and Naturalization, Bruce Barber, and all his agents of said Department, be enjoined from deporting Clemente Martinez Perez from the jurisdiction of this Court and from the United States, until the rights of said Clemente Martinez Perez shall have been ultimately adjudicated, pursuant to the action for a declaratory judgment now on file in this Court.

Dated: January 3rd, 1954.

Michael J. Roche, Judge of the District Court.

[File endorsement omitted]

[fol. 9] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE—Filed February 3, 1954

Comes now Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, hereinafter referred to as the respondent, by and through his attorneys, Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, and for reasons why a preliminary injunction should not be issued asserts as follows:

I

That the plaintiff was born in El Paso County, Texas, on March 17, 1909, of Mexican national parents.

II

That the plaintiff was arrested by the Immigration and Naturalization Service on June 12, 1953, on the ground that he had lost his United States nationality by remaining outside the United States from November 7, 1944, to August 1947 for the purpose of avoiding or evading training and service in the armed forces of the United States and that he had reentered the United States at El Paso, Texas, on June 19, 1952, while not in possession of a valid immigration visa.

[fol. 10]

III

That the plaintiff was ordered deported from the United States for the above reasons on July 16, 1953, by a Special Inquiry Officer.

IV

That on October 8, 1953, the order of the Special Inquiry Officer was affirmed and the appeal dismissed by the Board of Immigration Appeals at Washington, D. C.

V

That pursuant to the decision of the Board of Immigration Appeals a warrant of deportation was issued on October 8, 1953.

Wherefore, the respondent moves that the order to show cause be discharged and the restraining order issued January 28, 1954, be terminated on the ground that there is a valid and exis-int order of deportation under which the respondent may lawfully deport the plaintiff herein from the United States.

Dated at San Francisco, California, this 3rd day of February, 1954.

Lloyd H. Burke, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, Attorneys for defendant.

[File endorsement omitted].

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 12, 1954

Comes now Herbert Brownell, Jr., Attorney General of the United States, defendant in the above entitled action, by and through his attorneys Lloyd H. Burke, United States Attorney and Charles Elmer Collett, Assistant United States Attorney, and in answer to plaintiff's complaint admits, denies, and alleges as follows:

I

Admits the allegation contained in paragraph I of the Complaint.

II

Denies the allegations contained in paragraph II of the complaint and affirmatively asserts that the plaintiff is lawfully detained by the District Director, Immigration and Naturalization Service, San Francisco, pursuant to a valid order of deportation.

III

Denies that the plaintiff is a citizen or national of the United States, but admits that plaintiff was born in El Paso County, Texas, on March 17, 1909, and that he is the legitimate son of Clemente Martinez and Paria Perez, both of whom are nationals of Mexico; denies that plaintiff is a resi- [fol. 12] dent of the City and County of San Francisco and affirmatively asserts that he is temporarily detained in said city.

IV

Denies the allegations contained in paragraph IV of the complaint and affirmatively asserts that the plaintiff is not a national of the United States by reason of the fact that he has expatriated himself by remaining outside the United States to avoid military training and service.

V

Admits the allegations contained in paragraph V.

First Affirmative Defense

Defendant asserts that plaintiff remained outside the United States from November 7, 1944, to July 30, 1947, for the purpose of avoiding or evading training or service in the armed forces of the United States and that he thereby expatriated himself under the provisions of Section 401(j) of the Nationality Act of 1940 (8 U.S.C. 801(j)).

Second Affirmative Defense

Defendant asserts that plaintiff voted in a political elec- [fol. 13] tion in Mexico in 1946 and that he thereby expatriated himself under the provisions of Section 401(e) of the Nationality Act of 1940 (8 U.S.C. 801(e)).

Defendant asserts that plaintiff is properly subject to deportation as an alien, having lost his United States citizenship and having entered the United States on June 19, 1952, for permanent residence without an immigration visa as required by 8 U.S.C. 213(a).

Wherefore, defendant prays that the declaratory judgment sought by plaintiff be denied on the ground that the plaintiff has lost his American nationality by expatriation and that the plaintiff is properly subject to deportation from the United States.

(S.) Lloyd H. Burke, United States Attorney; Charles Elmer Collett, Assistant United States Attorney; Attorneys for defendant.

Acknowledgment of service (omitted in printing).

[File endorsement omitted].

[fol. 14] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed April 9, 1954

The above cause having come on regularly for trial before the Honorable O. D. Hamlin, Judge, presiding without a jury, the plaintiff appearing by his attorney, Salvatore C. J. Fusco, and the defendant appearing by his attorneys, Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court, having considered the same and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

The plaintiff, Clemente Martinez Perez, is the son of Mexican-born parents. He was born in the United States at El Paso, Texas, March 17, 1909.

II

The defendant, Herbert Brownell, Jr., is the Attorney General of the United States and as such is the head of the Immigration and Naturalization Service.

III

Plaintiff resided in the United States from the date of [fol. 15] his birth until about 1919 or 1920, at which time he departed to Mexico with his parents. Plaintiff resided continuously in Mexico from about 1919 or 1920 until June 19, 1952.

IV

Plaintiff in 1928 was informed that his birthplace was in the State of Texas. In 1932 he married a Mexican national; he claims that he is still married to the same person, and that there are seven children the issue of said marriage. Said wife and children have at all times resided in Mexico.

V

On July 28, 1943, plaintiff applied for admission to the United States as a Mexican alien railroad laborer. His application to Immigration authorities at that time stated that he was a native-born citizen of Mexico, having been born in Encarnacion de Diaz, Jalisco, Mexico. He was permitted to enter the United States for a temporary period for the purpose of performing services as a railroad laborer.

VI

Plaintiff returned to Mexico about March, 1944. Within one month thereafter he again applied for admission to the United States as a railroad laborer, again claiming that he was a native-born citizen of Mexico. He was admitted on the previous temporary authority for the purpose of continuing his employment as a railroad laborer. Plaintiff departed to Mexico in November, 1944.

[fol. 16]

VII

Plaintiff knew of the outbreak of World War II and of the duty of male citizens of the United States of America to register under the Selective Service Laws of the United States of America.

VIII

Plaintiff did not, at any time, register in accordance with the provisions and regulations of the Selective Training and Service Act of 1940.

IX

Plaintiff applied for admission to the United States as a citizen of the United States at the port of El Paso, Texas, on July 30, 1947. He was held for hearing before a Board of Special Inquiry. During the course of said hearing plaintiff admitted that he had remained outside the United States to avoid military service and that he had voted in elections in Mexico. He was ordered excluded by the Board of Special Inquiry on August 26, 1947, on the ground that he had expatriated himself.

X

Plaintiff appealed from the decision of the Board of Special Inquiry, and in his appeal again admitted that he had remained outside the United States to avoid military service and that he had voted in Mexican political elections. The Appeal was dismissed by the Assistant Commissioner [fol. 17] and by the Board of Immigration Appeals. The excluding order of the Board of Special Inquiry was affirmed.

XI

Plaintiff was again permitted to ented the United States on June 19, 1952 as a Mexican agricultural laborer upon the claim that he was a native-born citizen of Mexico.

XII

Plaintiff surrendered to Immigration authorities in San Francisco, California, on May 15, 1953 as an alien unlawfully in the United States but claimed that he was a citizen of the United States by birth and thereby entitled to remain. He was arrested in deportation proceedings and, after hearing before a Special Inquiry Officer, was ordered deported as an alien.

XIII

Plaintiff remained outside the United States from November 1944 to July 1947 for the purpose of avoiding or evading training or service in the United States Armed Forces.

XIV

Plaintiff voted in a political election in Mexico in July, 1946.

Conclusions of Law

I

Plaintiff having been born in the United States of America, was a citizen and national of the United States of [fol. 18] America by birth.

II

Plaintiff lost his said nationality of the United States of America under the Nationality Act of 1940, as amended

September 27, 1944 (8 USC 801(j)), by remaining outside of the jurisdiction of the United States in time of war for the purpose of evading and avoiding training and service in the land, air and naval forces of the United States.

III

Plaintiff lost his said nationality under the Nationality Act of 1940 (8 USC 801(e)) by voting in a political election in a foreign state: to-wit: Mexico.

IV

Judgment shall be entered in favor of defendant and against plaintiff, denying the relief as prayed for by plaintiff and adjudging that plaintiff is not a national or citizen of the United States of America.

Dated: April 9, 1954.

(S.) O. D. Hamlin, United States District Judge.

[File endorsement omitted.]

[fol. 19] In United States District Court for the Northern District of California, Southern Division

Civil No. 33293

Clemente Martinez Perez, Plaintiff,

vs.

Herbert Brownell, Jr., Attorney General of the United States, Washington, D. C., Defendant

Judgment—April 9, 1954

The above-entitled action came on for trial on February 17, 1954, before the above-entitled Court, the Honorable O. D. Hamlin, Judge presiding, the plaintiff appearing by his attorney Salvatore C. J. Fusco, and the defendant appearing by his attorneys Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States

Attorney, and the Court having filed herein its Findings of Fact and Conclusions of Law and having directed that judgment be entered in accordance therewith.

Now, therefore, it is ordered, adjudged and decreed:

(1) that the relief prayed for by the plaintiff in his complaint herein be and the same is hereby denied;

(2) that plaintiff Clemente Martinez Perez is not a National or citizen of the United States of America.

[fol. 20] Dated: April 9th, 1954.

(S.) O. D. Hamlin, Judge of the United States District Court.

Entered in Civil Docket April 12, 1954.

[File endorsement omitted.]

[fol. 21] In United States District Court

Notice of Appeal—June 4, 1954

Notice is hereby given that on this 7th day of June, 1954, plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court dated on the 12th day of April, 1954 in favor of defendant and against said plaintiff.

(S.) Salvatore C. J. Fusco, Attorney for Plaintiff.

[fols. 22-23] Bond on appeal for $250.00 filed August 27, 1954 omitted in printing.

[fol. 24] Designation of Record on Appeal (omitted in printing)

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 26-27] IN UNITED STATES COURT OF APPEALS

STATEMENT OF POINTS

Plaintiff sets forth the following points on which he intends to rely on this appeal:

1. The Court erred in holding that CLEMENTE MARTINEZ PEREZ is not a national or citizen of the United States of America.

2. The Court erred in holding that the plaintiff had not sustained the burden of proof.

3. The Court erred in finding that the defendant has sustained the affirmative allegations in defendant's Answer.

4. That the statute upon which the defendant relied to expatriate the plaintiff is unconstitutional.

5. That the findings, conclusions and judgment of the District Court are unsupported and contrary to the evidence of the record.

Respectfully Submitted, (S.) Salvatore C. J. Fusco,
Attorney for Plaintiff-Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted].

[fol. 28] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—July 9, 1956 (Omitted in Printing)

[fol. 29] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—July 12, 1956

Ordered that the typwritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 30] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,497

CLEMENTE MARTINEZ PEREZ, Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, Washington, D. C., Appellee

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, Chief Judge, HASTIE, Circuit Judge and TOLIN, District Judge

OPINION—July 12, 1956

TOLIN, District Judge:

This is an action wherein appellant sought declaratory relief.[1] After trial, the District Court found against him. He has not attacked the evidence but contended in the trial Court, and insists here, that Congress was without power to enact the statute which has been invoked against him.

Briefly stated, the facts found by the District Court are that appellant was born in El Paso, Texas, March 17, 1909, and resided in the United States until 1919 or 1920 when his parents took him to Mexico.

In 1928 he was informed that he had been born in Texas.

During World War II he applied for admission and was admitted into the United States as a Mexican alien railroad worker. His application for such entry contained his recitation that he was a native-born citizen of Mexico.

[fol. 31] The Court found that he knew at the outbreak of World War II that it was the duty of male citizens of the United States of America to register under the Selective Service Laws of the United States of America. Appellant did not so register at any time. During 1947 he was in

[1] Brought pursuant to Title 28, U. S. C. § 2201, and Title 8, U. S. C. § 1503.

Mexico and during that year applied for admission to the United States as a citizen of the United States. The District Court found that appellant was then held for a hearing before a Board of Special Inquiry and

> "* * * During the course of said hearing plaintiff admitted that he had remained outside the United States to avoid military service and that he had voted in elections in Mexico * * *".

The District Court further found:

> "Plaintiff remained outside the United States from November 1944 to July 1947 for the purpose of avoiding or evading training or service in the United States Armed Forces.
>
> "Plaintiff voted in a political election in Mexico in July, 1946."

On May 15, 1953, he surrendered to Immigration authorities in San Francisco as an alien unlawfully in the United States but claimed that he was a citizen of the United States by birth and thereby entitled to remain. This contention was urged in the present suit where the District Court stated in its Conclusions of Law:

> "Plaintiff lost his said nationality of the United States of America under the Nationality Act of 1940, as amended September 27, 1944 (8 USC 801(j)), by remaining outside of the jurisdiction of the United States in time of war for the purpose of evading and avoiding training and service in the land, air and naval forces of the United States.
>
> "Plaintiff lost his said nationality under the Nationality Act of 1940 (8 USC 801(e)) by voting in a political election in a foreign state: to-wit: Mexico."

Legislation providing for expatriation has been known in the United States at least since 1865 when Congress provided for forfeiture of the right of citizenship of deserters and enlisted draftees who depart from their district [fol. 32] or from the United States with intent to avoid draft into the armed forces.[2] The validity of the Act was

[2] Sec. 21 of the Act of March 3, 1865, 13 Stat. 490.

assumed and its effectiveness as an expatriation statute applied in a series of cases.[3]

It is not difficult to appreciate that a nation which requires successful applicants for naturalization to take an oath that they will render either military or certain service in lieu thereof, to the United States, would logically impose expatriation upon native-born citizens who repudiate a like obligation. However, the most direct authority approving the right of Congress to fix the conditions for loss of nationality arose in a case which had nothing to do with military service. In *Mackenzie v. Hare*,[4] a former Nationality Act was upheld in provisions which brought about expatriation of a woman by marriage to an alien. The Supreme Court ruled that this was within the power of Congress.

Expatriation was also accomplished by appellant's participation in a foreign election.[5]

Both grounds referred to in the quoted Conclusions of Law were within the statutes there referred to by the District Court. The right of Congress to enact such laws is clearly demonstrated by the cited cases.

The Judgment is affirmed.

[File endorsement omitted.]

---

[3] Kurtz v. Moffitt, 115 U. S. 487; In re Carver, 142 F. 623; United States v. Snow, 27 Fed. Cas. (No. 16,350) 1255, 1256 (E. D. Tenn.).

[4] 239 U. S. 299.

[5] Acheson v. Wohlmuth, 196 F. 2d 866; Acheson v. Kuniyuke, 189 F. 2d 741.

[fol. 33] In United States Court of Appeals for the Ninth Circuit

No: 14,497

Clemente Martinez Perez, Appellant

vs.

Herbert Brownell, Jr., Attorney General of the United States, Appellee

Judgment—Filed and entered—July 12, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 35] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 318 Misc.

[Title omitted]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

ORDER ALLOWING CERTIORARI—November 13, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 572 and placed on the summary calendar.

(3419-9)

Office - Supreme Court, U.S.
FILED
MAR 1 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~372~~ 44

CLEMENTE MARTINEZ PEREZ,
Petitioner,

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

CHARLES A. HORSKY,
701 Union Trust Building,
Washington 5, D. C.
FRED OKRAND,
A. L. WIRIN,
YALE KAMISAR,
Counsel for Petitioner.

JACK WASSERMAN,
Ass'n of Immigration and
Nationality Lawyers
SALVATORE C. J. FUSCO,
Of Counsel.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	2
Statement	3
Summary of Argument	4
Argument	7
I. Section 401(e) and (j) Rest on a Waiver of Citizenship Fiction Which Cannot be Constitutionally Sustained	13
II. The "Expatriating" Act Specified in Sections 401(e) and (j) Are Not Even Sufficiently Connected with expatriation to Meet the Minimum Standards of Due Process	27
III. Section 401(j) Is also Invalid Because It Imposes a Criminal Penalty Without Appropriate Constitutional Safeguards	31
Conclusion	45

AUTHORITIES

CASES:

Aetna Ins. Co. v. *Kennedy*, 301 U.S. 389	17
Bailey v. *Alabama*, 219 U.S. 219	5, 22, 24
Bisceglia v. *Acheson*, 196 F. 2d 865 (D.C. Cir. 1952)	21
Comitis v. *Parkerson*, 56 Fed. 556 (E.D. La., 1893)	11
Cummings v. *Missouri*, 4 Wall. 277	7, 42
Emspak v. *United States*, 349 U.S. 190	17
Ex parte Garland, 4 Wall. 333	7, 37, 43
Fong Yue Ting v. *United States*, 149 U.S. 698	13, 41
Galvan v. *Press*, 347 U.S. 522	8
Glasser v. *United States*, 315 U.S. 60	17
Gonzales v. *Landon*, 350 U.S. 920	7, 28, 35
Gotcheus v. *Matheson*, 61 N. Y. 420 (1870)	34

Cases—Continued

	Page
Harisiades v. *Shaughnessy*, 342 U.S. 580	8, 14, 42
Heiner v. *Donnan*, 285 U.S. 312	5, 25
Huber v. *Reily*, 53 Pa. St. 112 (1866)	7, 33, 35
Inglis v. *Trustees of Sailor's Snug Harbour*, 3 Pet. 99	11
Johnson v. *Zerbst*, 304 U.S. 458	5, 16, 17
Kawakita v. *United States*, 343 U.S. 717	14, 16
Kazdy-Reich v. *Marshall*, 88 F. Supp. 787 (D.D.C. 1950)	21
Klapprott v. *United States*, 335 U.S. 601	7, 41
Knauer v. *United States*, 328 U.S. 654	17, 28
Kurtz v. *Moffitt*, 115 U.S. 487	7, 34, 35
Mackenzie v. *Hare*, 239 U.S. 299	4, 6, 10, 14, 29, 30, 32
Mandoli v. *Acheson*, 344 U.S. 133	14
Manley v. *Georgia*, 279 U.S. 1	5, 23, 25
Matter of F——, 2 I. & N. Dec. 427	21
Matter of P——, 1 I. & N. Dec. 267	21
Mobile, J. & K.C. R.R. v. *Turnipseed*, 219 U.S. 35	25
Moser v. *United States*, 341 U.S. 41	31
Murray v. *The Charming Betsy*, 2 Cr. 64	10
McIlvaine v. *Coxe's Lessee*, 4 Cr. 208	10
Ng Fung Ho v. *White*, 259 U.S. 276	8
Perkins v. *Elg*, 307 U.S. 325	5, 14, 15, 16, 27
Savorgnan v. *United States*, 338 U.S. 491,	6, 13, 14, 31, 32
Schlesinger v. *Wisconsin*, 270 U.S. 230	26
Schneiderman v. *United States*, 320 U.S. 118	7, 17, 42
Severance v. *Healey*, 50 N.H. 488 (1870)	34
Shanks v. *Dupont*, 3 Pet. 241	11
Skinner v. *Oklahoma*, 316 U.S. 535	36
Smith v. *United States*, 337 U.S. 137	17
State v. *Symonds*, 57 Maine 148 (1869)	34
Tomasicchio v. *Acheson*, 98 F. Supp. 166 (D.D.C. 1951)	20
Tot v. *United States*, 319 U.S. 463	5, 23, 25
United States v. *Lovett*, 328 U.S. 303	7, 37, 44
United States v. *Wong Kim Ark*, 169 U.S. 649,	**5, 8, 14, 15, 27, 30**

CONSTITUTION OF THE UNITED STATES:

	Page
Art. I, § 8, cl. 4	10, 11, 17
Fifth Amendment	6, 25, 38
Eighth Amendment	35
Nineteenth Amendment	30

STATUTES:

Act of March 26, 1790, c. 3, 1 Stat. 103	10
Act of March 3, 1865, c. 79, 13 Stat. 490	32
Act of July 27, 1868, c. 249, 15 Stat. 223	10, 11, 34
Act of August 22, 1912, c. 336, 37 Stat. 356	34
Act of September 3, 1954, c. 1256, 68 Stat. 1146	13
Expatriation Act of 1907, c. 2534, 34 Stat. 1228:	
§ 2	12
§ 3	12, 30
Immigration and Nationality Act of 1952, c. 477, 68 Stat. 267	2, 13
§ 349(a)(4), 8 U.S.C. § 1481(a)(4)	20
§ 349(a)(5); 8 U.S.C. § 1481(a)(5)	2
§ 349(a)(10); 8 U.S.C. § 1481(a)(10)	2
Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, 58 Stat. 4 (1944), 58 Stat. 677 (1944)	12
§ 401(d)	20
§ 401(e)	Passim
§ 401(g)	34
§ 401(j)	Passim
§ 504	34
Selective Training and Service Act of 1940, c. 720, 54 Stat. 894:	
§ 11; 50 U.S.C. App. § 311 (1946)	32, 36
Selective Service Act of 1948, c. 625, 62 Stat. 622, § 12; 50 U.S.C. App. § 462	32, 36
United States Code:	
Title 18, Sec. 1	37
Title 28, Sec. 1254(1)	2

LEGISLATIVE MATERIALS:

Page

Annals of Congress:

Vol. 4, pp. 1027-1031 11
Vol. 7, pp. 349-354 11
Vol. 18, p. 1871 11
Vol. 31, pp. 495, 1028, 1030-1094, 1103-1107 11

Congressional Record:

Vol. 90, pp. 3261-3262 35, 38
p. 7629 37

Hearings Before House Immigration Committee on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 12, 34
H. Doc. No. 326, 59th Cong., 1st Sess. 12
S. Rep. No. 1075, 78th Cong., 2d Sess. 39

TREATISES AND ARTICLES:

Blackstone's Commentaries, Vol. 1, p. *138; Vol. 4, p. *377 36, 39, 40
Coke's Littleton, p. 129(a) 10
Hurst, *Can Congress Take Away Citizenship?* 29 Rocky Mountain L. Rev. 62 (1956) 8, 29
Laws Concerning Nationality (U.N. Leg. Ser. 1954) 22
McCormack on Evidence (1954) 26
Richardson, *Messages and Papers of the Presidents* 10, 12
Roche, *The Loss of American Nationality*, 99 U. Pa. L. Rev. 25 (1950) 34
Tsiang, *The Question of Expatriation in America Prior to 1907* (1942) 10, 11
Wigmore, *Evidence*, Vol. 4, Sec. 1353 (3d ed. 1940) 18, 26
Wines, *Punishment and Reformation* 40
Works of Alexander Hamilton 10
Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vand. L. Rev. (1955) 37
The Writings of Thomas Jefferson (Ford ed.) 10

Page

64 Yale L. J. 712 (1955) Comment, *The Communist Control Act of 1954* 37

64 Yale L.J. 1164 (1955), Comment, *The Expatriation Act of 1954* 14, 34, 35, 37

MISCELLANEOUS:

9 Op. Atty. Gen. 356 10, 11

Shipley, Speech on "Some Nationality Problems" (1950) 21

Universal Declaration of Human Rights, Art. 15 (adopted by the General Assembly of the United Nations, December 10, 1948) 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ,
Petitioner,

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The findings of fact and conclusions of law of the District Court (R. 9-12) are not reported. The opinion of the Court of Appeals (R. 15-17) is reported at 235 F. 2d 364.

Jurisdiction

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 18). Petition for a writ of certiorari was filed on October 10, 1956, and was granted on November 13,

1956. The jurisdiction of this Court rests on U.S.C., Title 28, Sec. 1254(1).

Statute Involved

Subsections (e) and (j) of Section 401 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1137), as amended by the Acts of January 20, 1944 (c. 2, 58 Stat. 4), of July 1, 1944 (c. 368, 58 Stat. 677), of September 27, 1944 (c. 418, 58 Stat. 746), all as incorporated in Section 349 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267) (U.S.C. Title 8, Sec. 1481 (a) (5) and (10)):

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by——
>
> * * * * *
>
> "(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory:
>
> * * * * *
>
> "(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

Question Presented

Are the provisions of Section 401(e) and 401(j) of the National Act of 1940, as amended, providing for the forfeiture of citizenship by a natural-born citizen of the United

States if he votes in a foreign election or remains outside of the United States to avoid military service, within the constitutional power of Congress?

Statement

Petitioner in this case seeks, pursuant to U.S.C., Title 28, Section 2201, and Title 8, Section 1503, a declaratory judgment that he is a citizen of the United States. After a hearing, the District Court denied the relief as prayed for, and adjudged that petitioner is not a national or citizen of the United States (R. 12). The court's findings of fact (R. 7-11) may be summarized as follows:

Petitioner was born in El Paso, Texas, on March 17, 1909, of Mexican-born parents. He resided there until he was 9 or 10 years old, when he went to Mexico with his parents. In 1932 he married a Mexican national, by whom he has had several children, who have always resided in Mexico. He had been informed in 1928 that his birthplace was the United States (R. 9).

In July 1943 petitioner re-entered the United States to work as a railway laborer, claiming at the time to be a Mexican. He returned to Mexico for a month in early 1944, and again re-entered the United States as a Mexican. In November, 1944, he departed to Mexico (R. 10). Petitioner knew of the duty of citizens of the United States to register under the Selective Service Laws, but did not do so (R. 10).

In July 1947 petitioner applied for admission to the United States as a United States citizen. He was held for a hearing before a Board of Special Inquiry of the Immigration Service. During the course of that hearing he admitted that he had remained outside the United States to avoid military service and that he had voted in elections in Mexico. He was ordered excluded on the ground that he

had expatriated himself, and that order was affirmed on appeal to the Board of Immigration Appeals (R. 10-11).

In June 1952 petitioner again entered the United States, as an agricultural worker, claiming that he was Mexican born. In May 1953, he presented himself to the Immigration authorities as an alien unlawfully in the United States, but claiming that he was a United States citizen and hence entitled to remain. After hearings, he was ordered deported as an alien (R. 11).

The court further found that petitioner remained outside the United States from November 1944 to July 1947 for the purpose of avoiding or evading training or service in the United States Armed Forces, and that he voted in a political election in Mexico in July 1946 (R. 11). On the basis of those findings the court concluded that petitioner had lost his United States citizenship by reason of Section 401(j) and 401(e) of the Nationality Act of 1940, as amended (R. 11-12). Judgment was entered on April 9, 1954 (R. 13).

In the Court of Appeals, petitioner did not attack the evidence, relying solely on the ground that subsections (e) and (j) of Section 401 were beyond the constitutional power of Congress. That court, relying largely upon the decision of this Court in *Mackenzie* v. *Hare*, 239 U.S. 299, affirmed the judgment on July 12, 1956 (R. 17, 18). Petition for a writ of certiorari was filed on October 10, 1956, and granted on November 13, 1956 (R. 19).

Summary of Argument

I

The present case does not present the problems heretofore dealt with by the Court in expatriation cases—the problem of the American citizen who voluntarily acquires citizenship in another country or the problem of the nat-

uralized American citizen. Petitioner here is rather a native-born American citizen who is being stripped of the American citizenship given him by the Constitution, *United States* v. *Wong Kim Ark*, 169 U.S. 649, and banished from the United States not because he has voluntarily acquired another citizenship elsewhere, but because the court has found that he did two acts which Congress in Section 401(e) and (j) of the Nationality Act of 1940, as amended, has specified to be "expatriating" acts.

The Government has heretofore sought to sustain the validity of these provisions by asserting that Congress may decree that the doing of a designated act will forfeit citizenship, and that once it has so decreed the doing of that act without duress constitutes a "voluntary" abandonment of citizenship. The argument cannot be sustained. Expatriation must be the voluntary act of the citizen, *Perkins* v. *Elg*, 307 U.S. 325, 334, and Congress cannot create a legislative presumption—particularly a conclusive one, such as it has purported to establish in Section 401(e) and (j)—that such an intention to relinquish a constitutional right exists by reason of the commission of acts to which such intention has no rational or reasonable relationship. *Bailey* v. *Alabama*, 219 U.S. 219; *Manley* v. *Georgia*, 279 U.S. 1; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312. Particularly is this true because the court will indulge every reasonable presumption against the waiver of a fundamental constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

II

The absence of rational and reasonable relationship between the acts specified in Section 401(e) and (j) and an intention to waive or abandon American citizenship leads to an even more fundamental constitutional objection to those subsections. Even were citizenship for a native-born

American not a right granted directly by the Constitution, nonetheless the bundle of rights which constitute the rights of citizenship, including particularly the right to remain in the United States, is certainly protected from arbitrary deprivation by the Fifth Amendment. The assertion by the Government that the acts specified in Section 401(e) and (j) have a reasonable relation to the "cardinal elements of American nationality and allegiance," is either meaningless, or—if it means that any criminal or anti-social conduct may be made an "expatriating" act—proves far too much. *Mackenzie* v. *Hare*, 239 U.S. 299, which is chiefly relied upon by the Government to sustain its position, resorted to upon the common-law concept of identity of husband and wife to supply the necessary rational connection between the act of marriage to a foreigner and the voluntary renunciation of citizenship. Whether or not the case would be decided the same way today, it does not support the Government's present contention. *Savorgnan* v. *United States*, 338 U.S. 491, is equally irrelevant, for there is, without doubt, a rational connection between the act which the citizen did there—voluntary naturalization in another state—and an intent to renounce American citizenship.

III

Section 401(j) is subject to the additional constitutional objection that it imposes punishment for a crime without affording the constitutional safeguards accorded to an accused in a criminal proceeding. The act specified in that subsection, which petitioner was found to have committed, is a federal crime. Petitioner has never been indicted nor convicted of that crime, yet, as a result of the finding that he had done that act, he has had imposed on him drastic punishment.

1. The penal nature of Section 401(j) is evident from its legislative antecedents. A similar Civil War statute was

sustained as constitutional only by reading into it a requirement that the offense should first be established in a criminal proceeding. *Huber* v. *Reily*, 53 Pa. St. 112 (1866); *Kurtz* v. *Moffitt*, 115 U.S. 487, 501. That statute and Section 401(j) show such a close historical relationship that the Government in its brief at the last term in *Gonzales* v. *Landon*, No. 111, pp. 43, 61, characterized the latter as one which "reinstated, in effect", the Civil War act. It should, therefore, be subject to the same constitutional limitations recognized in *Kurtz* v. *Moffitt*, and its application to petitioner, absent a criminal conviction, held to be unconstitutional.

2. The same result follows even if Section 401(j) be considered apart from its antecedents. All of the elements of a penal statute are present. The conduct described is a federal crime. The proceedings in Congress at the time of its enactment in 1944 show that it was intended to impose a punishment for draft evasion on those who might not, because of absence from the country, be amenable to the criminal courts. The penalty which it prescribes is exceptionally severe; banishment has long been recognized as among the most drastic punishments which can be imposed. *Klapprott* v. *United States*, 335 U.S. 601, 611-612; *Schneiderman* v. *United States*, 320 U.S. 118, 122. That Section 401(j) is not labelled as a penal statute, nor loss of citizenship as punishment, is of course irrelevant. "The Constitution deals with substance, not with shadows." *Cummings* v. *Missouri*, 4 Wall. 277, 325. See also Ex parte *Garland*, 4 Wall. 333, 377; *United States* v. *Lovett*, 328 U.S. 303, 316.

ARGUMENT

This case deals with the citizenship rights of a native-born American. For such a person, as this Court declared

in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703, "citizenship [is] acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation." It is this citizenship—this constitutionally derived right—which Congress here assumes to take away.

Since citizenship is the key to all other rights guaranteed by the Constitution, citizenship is undoubtedly the most precious right of all. If it can be made forfeit for acts which Congress prescribes, all other constitutional rights may be placed beyond one's reach. Whatever the rights of an alien may be so long as he remains within the confines of the United States,[1] "his domicile here is held by a precarious tenure", being "not his right but * * * a matter of permission and tolerance". *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587. See also *Galvan* v. *Press*, 347 U.S. 522, 531; *Ng Fung Ho* v. *White*, 259 U.S. 276, 280. As one recent writer has put it (Professor Harold Hurst, *Can Congress Take Away Citizenship?* 29 Rocky Mountain L. Rev. 62, 63-64 (1956)):

> "The major difference, then, between citizen and alien appears in all its stark reality when the nation withdraws its hospitality and requests the alien to withdraw or be cast out. It is the right to be here, to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value.
>
> * * * * *
>
> "One can hardly be said to be entitled to anything at the hands of a government if that government has the

[1] See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586, nn. 9, 10; 64 Yale L. J. 1164, 1166-1169 (1955).

power to cast a person out. That the nation has such power over *aliens* is now beyond question.

* * * * *

"It follows, then, that if the Congress can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of this ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores. For to take away a person's citizenship is to make him an alien, subject to deportation."

The statutory provisions here involved—subsections (e) and (j) of Section 401—do not require, and there is no finding that petitioner ever had, any intention or desire to lose this basic constitutional right. The courts below have declared it forfeit simply because petitioner did two acts —remaining out of the United States to avoid the draft, and voting in a foreign election—each of which Congress has assumed to make the *per se* basis for forfeiture of this right. We submit that Congress lacked the power to do so.

We believe the Court will be aided in considering the issues here involved by a brief summary of the historical background of expatriation in this country. This history will reveal that the concern during the early days of our history was over the question of the right of a person to renounce citizenship when he wished to do so. Problems of dual nationality, or asserted dual nationality, loomed large, and Congress, both in respect to the right of expatriation, and the methods by which it was to be accomplished, concerned itself mainly with those problems. The history will also reveal the comparatively recent development of provi-

sions which create the constitutional issue with which we are here concerned.

While, as early as 1790, Congress exercised the power granted to it by Article 1, Section 8, Clause 4, by passing a law for the acquisition of United States citizenship by naturalization (Act of March 26, 1790, c. 3, 1 Stat. 103), over 75 years went by before Congress enacted the first act recognizing the right of expatriation (Act of July 27, 1868, c. 249, 15 Stat. 223). Under the common law of England, citizenship was considered immutable—*Nemo patriam in qua natus est exuere nec ligeantiae debitum ejurare possit. Coke's Littleton,* 129(a); *Mackenzie* v. *Hare,* 239 U.S. 299; 9 Op. Atty. Gen. 356. This common law principle resulted, of course, in conflicting claims to the allegiance of individuals who became naturalized under our laws. Foreign nations claimed that naturalized Americans continued to bear responsibilities and obligations to countries to which they had renounced allegiance. The issue was a subject of controversy between the United States and Great Britain,[2] between Jefferson and Hamilton,[3] and between members of the judiciary in the various state courts.[4] This Court, in its early decisions, either avoided the issue, as in *Murray* v. *The Charming Betsy,* 2 Cr. 64, 120, and *McIlvaine*

---

[2] The impressment of British seamen who had become Americans was one of the causes of the War of 1812. II Richardson, Messages and Papers of the Presidents, 485

[3] Tsiang, The Question of Expatriation in America prior to 1907, p. 28. Jefferson believed in the right of expatriation as early as 1776 (The Writings of Thomas Jefferson (Ford ed.) (Vol. X, p. 47)), and in 1779 drafted the Virginia code permitting express renunciation, in court or in a written document. Hamilton, on the other hand, believed that the right of expatriation would encourage desertion and was therefore subversive of government. IV Works of Alexander Hamilton, p. 256.

[4] The right of voluntary expatriation was explicitly denied in Massachusetts, Connecticut and New York, but implicitly affirmed in North and South Carolina and Mississippi, and recognized by statute in Pennsylvania, Virginia and Kentucky. Tsiang, *supra,* note 3, pp. 69-70.

v. *Coxe's Lessee*, 4 Cr. 208, 212, or acknowledged that expatriation might be accomplished only by mutual consent of the individual and his government. *Inglis* v. *Trustees of Sailor's Snug Harbour*, 3 Pet. 99, 125; *Shanks* v. *Dupont*, 3 Pet. 241, 246.

Attempts to legislate upon the subject of expatriation began in 1794 (4 *Annals of Congress* 1027-1031), and continued from time to time thereafter. See, e.g., 7 *Annals of Congress* 349-354; 18 *id.* 1871; 31 *id.* 495, 1030-1094, 1103-1107. Constitutional objections to the power of Congress to provide for expatriation were effectively answered by reference to the power of Congress to provide for naturalization granted by Article I, Section 8, Clause 4; no government can presume to naturalize foreigners and at the same time insist with respect to its own citizens that it is powerless to recognize a right of expatriation. See e.g., 31 *Annals of Congress* pp. 1028, 1063, 1067. In 1859, Attorney General Black advised the President (9 Op. Atty. Gen. 356, 358):

> "Among writers on public law the preponderance in weight of authority, as well as the majority in numbers, concur with Cicero, who declares that the right of expatriation is the firmest foundation of human freedom, and with Bynkershoek, who utterly denies that the territory of a State is the prison of her people."

Finally, in 1868, Congress declared that "the right of expatriation is a natural and inherent right of all people". Act of July 27, 1868, c. 249, 15 Stat. 223. Unfortunately, the act did not provide a definition of the means by which expatriation could be accomplished, and each case had to be decided on its merits, with not always consistent results. *Tsiang, supra*, note 3, p. 103; *cf. Comitis* v. *Parkerson*, 56 Fed. 556 (E.D. La., 1893).

In the years that followed, the President frequently called to the attention of Congress the need for a legislative definition of the method by which expatriation might be accomplished.[5] Finally, in 1906, a report was submitted to Congress (H. Doc. No. 326, 59th Cong., 1st Sess.) which became the basis of the Expatriation Act of 1907 (Act of March 2, 1907, c. 2534, 34 Stat. 1228). Two methods of expatriation were recognized (Sec. 2)—naturalization in a foreign state and subscription to a foreign oath of allegiance—both reflecting the need of preventing the difficulties and international complications which could result from divided allegiance voluntarily acquired. The 1907 act also provided (Sec. 3) that an American woman who married a foreigner should take the nationality of her husband —likewise, as we shall see, *infra*, pp. 29-31, a reflection of the difficulties which would result from the voluntary acquisition by an American citizen of a foreign citizenship, particularly in the light of the then prevailing concepts of the natural identity of husband and wife.

Thus the matter rested until 1933. In that year, by Executive Order, a committee consisting of the Secretary of State, the Attorney General and the Secretary of Labor was appointed to recommend a comprehensive nationality law, and in 1940, after extensive hearings (*Hearings Before House Immigration Committee on H.R. 6127, superseded by H.R. 9980*, 76th Cong., 1st Sess.), the Nationality Act of 1940 was enacted (Act of October 14, 1940, c. 876, 54 Stat. 1137). The grounds of expatriation for natural-born citizens were considerably expanded; foreign military service, foreign civil service, voting in foreign elections, renunciation before a consul abroad, and treason and desertion, after conviction thereof, were added as automatic grounds.

---

[5] See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1874, 1885 and 1904. Richardson, *supra*, Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis) p. 851.

for expatriation. Subsection (j), with which we are here concerned, was added in 1944 (Act of September 27, 1944, c. 418, 58 Stat. 746) and in 1952 this and other changes not now relevant were incorporated into the substantial renactment of Section 401 as Section 349 of the Immigration Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267). By further amendment in 1954, conviction for communist activity was added as a ground of expatriation (Act of September 3, 1954, c. 1256, 68 Stat. 1146).

I

Section 401(e) and (j) Rest on a Waiver of Citizenship Fiction Which Cannot Be Constitutionally Sustained

We do not meet in this case the problem which has occupied the attention of Congress in various ways since 1790—that raised by an American citizen who voluntarily acquires citizenship in another country. For purposes of this case, at least, the Court need not consider the constitutional power of Congress to regulate and control the consequences which flow from the voluntary acquisition by an American citizen of nationality in a foreign state. We may assume, *arguendo*, that the power "inherent in sovereignty, and essential to self-preservation" which enables the Congress to regulate the entrance of foreigners and the conditions under which they shall be allowed to remain in the United States (*Fong Yue Ting* v. *United States*, 149 U.S. 698, 705), likewise enables it to regulate, and to impose conditions upon, even a native-born citizen who by his own volition acquires the status of a foreigner. "The United States has long recognized the general undesirability of dual allegiances." *Savorgnan* v. *United States*, 338 U.S. 491, 500. The nation's independence and security might be jeopardized by immunized movement of persons who,

though born in the United States, have sought and accepted citizenship in a foreign state.

This Court has referred to an alien as one who "perpetuates a dual status as an American inhabitant but foreign citizen". *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585. One who voluntarily acquires a dual status as a native-born American but foreign citizen might be similarly viewed. The dual national, moreover, does not face the prospect of statelessness—of being a man without a country—a status which has been condemned by numerous international conferences on nationality, by Article 15 of the Universal Declaration of Human Rights, and by all recognized treatises. See 64 Yale L. J. 1164, 1195. His voluntarily acquired foreign citizenship simply becomes his sole citizenship if his American citizenship no longer exists. It is clear, however, that this "dual national" status, which may render the native-born American vulnerable to Congressional legislation depriving him of his American citizenship, must be voluntarily acquired. *Perkins* v. *Elg*, 307 U.S. 325, 329, 334. It is significant that in every expatriation case thus far considered by this Court the individual involved has either been a dual national (*Mandoli* v. *Acheson*, 344 U.S. 133; *Kawakita* v. *United States*, 343 U.S. 717; *Perkins* v. *Elg*, 307 U.S. 325), or a person who has actually acquired a foreign citizenship by performing the act which was found to have expatriated him under American law (*Savorgnan* v. *United States*, 338 U.S. 491; *Mackenzie* v. *Hare*, 239 U.S. 299).

This is not such a case. The instant petitioner has not voluntarily become a "dual national"—a quasi-citizen, quasi-foreigner—nor did he acquire such status by performing the acts which—unless the Court intervenes—will inexorably lead to his deportation.

United States v. *Wong Kim Ark*, 169 U.S. 649 dealt with

the citizenship rights of a native-born American who, as in the case with the instant petitioner, had not altered his status by acquiring a second nationality elsewhere. As to such citizens, as this Court then observed, Congress has no power to "restrict the effect of birth" (at p. 703):

> "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual * * *" *Osborn* v. *United States Bank*, 9 Wheat. 738, 827 [per Marshall, C. J.]. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

The Government has not, so far as we are aware, asked that *Wong Kim Ark* be overruled. Nor has it challenged the statement in *Perkins* v. *Elg*, 307 U.S. 325, 334, that "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance," and that it is "voluntary action which is of the essence of the right of expatriation." Instead, it has sought, when attempting to sustain the constitutionality of the various provisions of the 1940 act which

do not deal with voluntary acquisition of another nationality, to bring those provisions within the "voluntary" concept by applying "voluntary" not to the expatriation itself, but to some other act which Congress has specified. If *that* act is done "voluntarily", then, the Government contends, the requirement of "voluntary renunciation" is met.

Before dealing with this argument, it should be made perfectly clear that the Government is *not* simply contending that one who does an act knowing that it has certain consequences is presumed to intend those consequences. In the present case there is no finding that petitioner knew that by his act of voting, or by his act of remaining in Mexico when he should have registered with a draft board in the United States, he was doing an act which Congress has said would forfeit his American citizenship. The position taken by the Government is far more sweeping. Stated in its simplest terms, it is that Congress may decree that the doing of a designated act will forfeit citizenship, and that once it has so decreed, the doing of that act without duress constitutes, *ipso facto*, a "voluntary" abandonment of citizenship.

We recognize, of course, that the right of citizenship, as well as other personal rights protected by the Constitution, may be waived. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. "Expatriation" is defined in virtually identical fashion: "the voluntary renunciation or abandonment of nationality and allegiance." *Perkins* v. *Elg*, 307 U.S. 325, 334. We recognize, too, that voluntary renunciation or abandonment of citizenship may be inferred from the circumstances of a particular case. *Cf. Kawakita* v. *United States*, 343 U.S. 717, 727.

While we acknowledge this, we also must recognize a further principle, deep-seated in the decisions of this Court —that "waiver of constitutional rights * * * is not lightly to be inferred." *Smith* v. *United States*, 337 U.S. 137, 150. Indeed, this Court has insisted that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. See *Emspak* v. *United States*, 349 U.S. 190, 196; *Glasser* v. *United States*, 315 U.S. 60, 70; *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393.

We believe that the argument of the Government ignores both the requirement of volition, and the strong presumption against waiver. The argument fails to recognize that what it asserts is "voluntarily" relinquished is a *constitutional* right. Citizenship of a natural-born citizen is not a right with which Congress may deal as it sees fit, in the way in which it can condition, for example, the grant of citizenship to one who becomes naturalized.[6] Natural-born citizenship stands on the same high level of protection as other rights guaranteed by the Constitution, and must be accorded the same constitutional protection.

The point can be illustrated by hypothetical legislation dealing with analogous constitutional rights. Suppose Congress were to enact the following laws:

> "In all criminal prosecutions, the voluntary surrender of the accused to the proper authorities shall be conclusive evidence of the waiver of his right to the assistance of counsel for his defense.
>
> "In suits at common law, the seeking of damages in

---

[6] "The Constitution authorizes Congress 'to establish an uniform rule of naturalization' (Art. I, § 8, cl. 4), and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit." *Schneiderman* v. *United States*, 320 U.S. 118, 131. "The power of denaturalization comes from that provision and the 'necessary and proper' Clause." *Knauer* v. *United States*, 328 U.S. 654, 673.

excess of twenty thousand dollars ($20,000) shall raise an irrebuttable presumption that plaintiff has waived the right of trial by jury.

"The failure of a person to physically resist the attempt of an officer to enter his house shall be deemed a waiver of his right against unreasonable searches and seizures."

The unconstitutionality of such laws is not open to doubt. Each of them, while purporting to establish a rule of evidence on the issue of a waiver of constitutional rights, in fact dispenses with the constitutional guarantees altogether.

Of course, where the ultimate fact to be presumed is not constitutionally protected, the statute, though cast in terms of "conclusive evidence", may be saved as a rule of substantive law, the basic fact simply displacing the presumed fact as the substantive law.[7] But where the presumed fact, to use the terminology of Dean Wigmore, is "*constitutionally preserved* as the ultimate fact on which the right or obligation depends" (4 *Wigmore, Evidence,* Sec. 1353, p. 715 (3d ed. 1940)), the rules of evidence cannot be regarded as rules of substantive law (*ibid.*):

"* * * a law providing that an assessor's or collector's deed of land sold for taxes shall be conclusive evidence that all due proceedings have been taken in the forfeiture * * * in effect provides that the property may be taken although in fact due proceedings have not

[7] "* * * to make a rule that as between successive grantees the recorder's certificate of the time of filing deeds shall be conclusive, is not to make a rule of Evidence, but merely to provide in the law of land-transfer that a deed found to be recorded as of a prior date shall take effect against a deed found to be recorded as of a subsequent date, irrespective of the actual time of entry and record. * * * the use of the term 'conclusive evidence' cannot conceal the true nature of the rule as a rule of substantive law making a certain right or obligation depend upon the existence of a certain official writing irrespective of its truth." 4 Wigmore Evidence § 1353 at 714 (3d ed. 1940).

been had,—in short, while purporting to make a rule of Evidence, it really makes a rule of Property-Law, by which certain acts are declared unnecessary which the Constitution has declared necessary."

That subsections (e) and (j) are not cast in the language of presumptions is immaterial. The statutory precursor of subsection (j), see pp. 32-35, *infra*, proclaimed that deserters and those who "go beyond the limits of the United States, with intent to avoid any draft into the military or naval service" "shall be *deemed and taken* to have voluntarily relinquished and forfeited their rights of citizenship" (italics supplied) (13 Stat. 490-491). But whatever form of words may be used, the consequence is the same, when the subsections are sought to be sustained as various means of *voluntary* renunciation or abandonment of citizenship. Necessarily, the acts which are specified in those subsections are presumed to constitute that *voluntary* waiver of a constitutional right. Such terms as "conclusive evidence" or "conclusive presumption" may be disregarded, and the statute viewed as a rule of substantive law, where no constitutional rights are involved. Similarly, a purported rule of substantive law, the constitutional validity of which is asserted to depend upon a presumption of the waiver of a constitutional right, may be analyzed and viewed as a rule of evidence.

It is apparent that when the challenged subsections are so regarded, they cannot stand. There is no rational connection between foreign voting or draft evasion by remaining outside the country and intentional, voluntary, abandonment of nationality and citizenship. That rational connection being absent, the statutory presumption violates due process.

It does not suffice to demonstrate a rational connection to speak of draft evasion by leaving the country as "in-

consistent with good citizenship" or "contrary to the obligations of citizenship". Indeed, as we show below, pp. 37-39, it is highly doubtful that the provisions of Section 401(j) were ever thought of by Congress as resting on any such basis. We agree, of course, that draft evasion is both of these, but so is draft evasion without leaving the country, tax evasion, avoidance of jury service, fleeing the country to escape trial for murder, failure to vote, and a host of other acts. Surely the failure in any of these ways to meet standards of good citizenship or the obligations of citizenship cannot be rationally equated with an intention to abandon citizenship altogether.

We realize, of course, that draft evasion is dishonorable and disgraceful, whether or not it is, as it may be, the product of either fear or ignorance or both. But as a federal court recently observed in holding that a native-born American had not "expatriated" himself, "The Government does not restrict its solicitude to stout-hearted men. The timid, the weak and the ignorant are equally entitled to protection." *Tomasicchio* v. *Acheson*, 98 F. Supp. 166, 174 (D.D.C. 1951).

Nor does voting in a foreign political election have a rational connection with the voluntary relinquishment of American citizenship such as to justify its designation as an "expatriating" act. Were a foreign state to limit the right to vote to those who have become citizens of that foreign state, or condition voting upon acceptance of such citizenship, voting by an American in that state might create the same problem of voluntary assumption of dual nationality for which Congress has provided in other connections.[8]

---

[8] Compare, for example, the provisions of Section 401(d) (U.S.C., Title 8, Sec. 1481(a)(4)(B), quoted in the Appendix *infra*, p. 47), which provides for loss of citizenship by accepting employment from a foreign government if the position requires an oath of allegiance to the foreign state.

But there is no such limitation in the present act and no such situation in the present case—a vote in a foreign political election, *ipso facto,* suffices.

It is apparent that, standing alone, voting in a foreign election evidences no more than some interest in the affairs of one's inhabitance. Yet, under this act, citizenship is "voluntarily" renounced by reason of a vote in a local Canadian election on whether beer or wine should be sold. Matter of F —, 2 I.&N. Dec. 427; *cf.* Matter of P—, 1 I.&N. Dec. 267. Indeed, it is apparent that in many instances voting in a foreign election may evidence a high regard for the interests of the United States, and may be an act of which the United States is, and is intended to be, a direct beneficiary. In *Kazdy-Reich* v. *Marshall,* 88 F. Supp. 787 (D.D.C. 1950), the "expatriating" act of foreign voting was motivated by a desire to aid American foreign policy and to defeat the Communists. Yet the Court, applying inexorably a statute which puts blinders on its eyes, decreed that the foreign voting must be deemed to have established a "voluntary" abandonment of American citizenship. *Cf. Bisceglia* v. *Acheson,* 196 F. 2d 865, 866 (D.C. Cir. 1952).[9] Indeed, the lack of correlation between voting in a foreign election, and a voluntary abandonment of

---

[9] In a speech on "Some Nationality Problems" delivered on May 20, 1950, to the Fifth National Conference on Citizenship (see Washington Evening Star May 21, 1950, p. A-21) Mrs. Ruth Shipley, Chief of the Passport Division of the Department of State, referring, *inter alia,* to the statutory provisions for expatriation by voting in a foreign election, which she referred to as "relating to the involuntary loss of nationality", said:

> "Any of these acts may not be inconsistent with devotion and loyalty to America and the principles for which it stands. * * * Take voting.—In Denmark and in Norway all possible votes were necessary to turn elections against the Nazis; in Italy, votes of Italian-Americans helped to save that country from the devastating rule of communism; in Hungary and Roumania, and I have no doubt in other countries, voting saved many from starvation by enabling them to keep their food ration cards. Yet these people lost their greatest treasure—American citizenship."

citizenship, is strikingly evident in the fact that nowhere else in the world is it made an "expatriating" act.[10]

We submit that even had Congress done no more than to create a rebuttable presumption that either of the acts described in Section 401(e) and (j) evidenced the voluntary waiver of citizenship—had made the specified acts no more than *prima facie* proof of voluntary renunciation—that presumption could not be squared with the prior decisions of this Court. In *Bailey* v. *Alabama*, 219 U.S. 219, the Court struck down a statute which made the failure to perform certain contracts of service *prima facie* evidence of an intent to injure or defraud. The Court observed that the "asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned." (219 U.S. at 234). The Court continued (pp. 235, 238):

> "The 'difficulty,' which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly, the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence.
>
> * * * * *

---

[10] Laws Concerning Nationality (U.N. Leg. Ser. 1954). The statement in the text should perhaps be qualified by reference to the laws of Andorra, which provide for expatriation for the "exercise of foreign political rights" which may include voting.

This United Nations study, which covers the laws of 83 nations, reflects the length to which the United States has attempted to go to deprive native-born Americans of their birthright. We have more statutory grounds for expatriation of native-born citizens than any other country in the world. Not only are we the only country (possibly excepting Andorra) to expatriate upon the ground of participation in a foreign election, but we share with only four other countries (Bulgaria, Greece, Poland and Turkey) expatriation for draft evasion, and in one of these (Turkey) expatriation is permissive rather than mandatory.

> "We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured."

In *Manley* v. *Georgia*, 279 U.S. 1, this Court branded as "unreasonable and arbitrary" a state statute which read (279 U.S. at pp. 3-4):

> "Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe."

The terse comment of the Court was (279 U.S. at p. 7):

> "The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. *Hawes* v. *Georgia*, 258 U.S. 1, 4. The presumption created * * * is unreasonable and arbitrary."

Again in *Tot* v. *United States*, 319 U.S. 463, this Court overturned, as lacking the requisite "rational connection between the fact proved and the ultimate fact presumed" (319 U.S. at p. 467), a federal statute which provided (319 U.S. at p. 464):

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

Said the Court (319 U.S. at pp. 467-468):

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the act proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience * * * where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts."

The inference of "expatriation"—voluntary renunciation of American citizenship—from either draft evasion by leaving or remaining outside of the country or foreign voting is similarly "arbitrary because of lack of connection between the two in common experience". It is similarly "so strained as not to have a reasonable relation to the circumstances of life as we know them". There is no greater connection between such draft evasion or foreign voting and "expatriation" than there is between the failure to perform a contract for services and the presumption of intent to defraud one's employer, struck down in *Bailey* v. *Alabama*, *supra;* or between the insolvency of a bank and

the presumption of fraudulent practices on the part of the bank's president and directors, struck down in *Manley* v. *Georgia, supra;* or between a convict's possession of firearms and ammunition and the presumption that they were received via interstate shipment, struck down in *Tot* v. *United States, supra.*

Under these decisions, there must be a rational connection between the fact proved (*e.g.*, voting in the foreign election) and the ultimate fact presumed (voluntary renunciation or abandonment of citizenship), even where the presumption is not conclusive but one establishing a *prima facie* case. Here, however, the presumption of voluntary action sought to be created by subsections (e) and (j) of Section 401 cannot be overcome by the most overwhelming proof to the contrary. Regardless of the actualities of the particular case, it is conclusive. Here, then, even were it possible to say that a rational connection existed between the fact proved and the ultimate face presumed, the sections would nonetheless violate the due process clause of the Fifth Amendment. A presumption must "not shut out from the party affected a reasonable opportunity to submit * * * in his defense all of the facts bearing upon the issue." *Mobile, J. & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43.

Heiner v. *Donnan*, 285 U.S. 312, is the classic example. There, in order to prevent evasion of inheritance taxes, Congress provided that gifts made within two years of the donor's death were to be deemed to have been made in contemplation of death. The Court recognized that Congress might create a rebuttable presumption—*i.e.*, that a rational connection existed between the fact proved and the ultimate fact presumed—but when it was made "incapable of being overcome by proof of the most positive character," (285 U.S. at p. 324), it was stricken down under the Fifth Amendment. The Court said (285 U.S. at p. 329):

"* * * whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. * * *

* * * * *

"If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."

See also *Schlesinger* v. *Wisconsin,* 270 U.S. 230.

Where the presumed fact is "constitutionally preserved", the use of conclusive presumptions cannot be used as a means of escape from constitutional restrictions. Dean Wigmore, whose approach toward statutory presumptions generally, as another eminent authority has observed, "is simply and directly that 'the sky is the limit'" (*McCormick on Evidence,* Sec. 313, at p. 655 (1954)), recognizes that to "the question whether the Legislature can constitutionally oblige the Judiciary to forego its own investigation * * * the answer can hardly be doubtful" (4 Wigmore Sec. 1353 at pp. 715-716):

"The judicial function under the Constitution is to apply the law in controverted cases; to apply the law necessarily involves the determination of the facts; to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function.

"Hence, to make a rule of conclusive evidence, com-

pulsory upon the Judiciary, is to attempt an infringement upon their exclusive province."

We must reiterate that we are *not* dealing with a situation in which Congress has undoubted power to declare substantive law. We are dealing with a right which is accorded by the Constitution. *United States* v. *Wong Kim Ark*, 169 U.S. 649; *Perkins* v. *Elg*, 307 U.S. 325. The ultimate fact upon which alone the loss of citizenship must rest (apart from the problems involved in the voluntary acquisition of foreign citizenship) is *voluntary* abandonment. What we urge is that it is wholly beyond the power of Congress to enact a statute which, in effect, conclusively presumes that voluntary abandonment from the doing of another act which, in common experience, has no rational connection to such a waiver or abandonment. That is simply taking away native-born citizenship involuntarily. That, we believe, may not be done under our Constitution.

II

The "Expatriating" Acts Specified in Sections 401(e) and (j) Are Not Even Sufficiently Connected With Expatriation to Meet the Minimum Standards of Due Process.

In Point I, *supra*, we have dealt with the contention that petitioner may be said to have "voluntarily" waived his right to American citizenship by reason of having committed, voluntarily, acts which have been designated as expatriating acts, *per se*. That argument has been made first, because it appears to be the principal basis upon which the validity of the challenged subsections is sought to be maintained.

We believe, however, that there is an even more fundamental constitutional infirmity to which Sections 401(e) and (j) are subject. Even if citizenship for a native-born

American were not a right directly granted by the Constitution, nonetheless the right to remain in the United States certainly falls within the rights guaranteed against arbitrary deprivation by the "life, liberty or property" clause of the Fifth Amendment. We believe that Sections 401(e) and (j) violate that provision of the Constitution.

The Government does not appear to contend that Congress can make any act which an individual might perform an "expatriating" act. Heretofore, at least, it has conceded that the limits imposed upon Congress—presumably by the Fifth Amendment—require that the "expatriating" act must meet a "reasonable connection" test. Last term, in a case involving Section 401(j) (*Gonzales* v. *Landon*, No. 111) (in which the Court did not reach the constitutional issue, 350 U.S. 920), the Government asserted (Br. for Resp., p. 57):

> "The only generalization we would offer is that the act of expatriation must have such a close connection with the cardinal elements of American nationality and allegiance that it is reasonable, with due consideration for the 'cherished status' of American citizenship (*Knauer* v. *United States*, 328 U.S. 654, 658), for Congress to impose loss of nationality as a result of the commission of the act".

We submit that the subsections of Section 401 do not meet this standard. We need not repeat here what we have already pointed out above—the lack of any rational connection between the "expatriating" acts specified in Sections 401(e) and (j) and what the Government calls "the cardinal elements of American nationality and allegiance." Draft evasion by leaving the country no more evidences expatriation than do a hundred other offenses. The crossing of the Rio Grande or the Canadian border by a draft-dodger no more demonstrates an intention to forfeit Amer-

ican nationality than does the crossing of the same boundaries by a kidnapper with his victim, or by a merchant in the course of his black market dealings. No doubt the extreme sanction of banishment is an effective sanction to punish draft dodging. Indeed, that Congress intended to inflict punishment, as we show in Point III, *infra*, emphasizes the real absence of any rational connection between the offense described in subsection (j) and the voluntary and intentional forfeiture of citizenship. But banishment could be equally effective in punishing income tax evasion, or the smuggling of firearms or untaxed liquor, or leaving the country to avoid a Congressional subpoena. Unless the Government means that anyone who commits a crime can rationally be said to intend that his American citizenship may be forfeit, the contention of the Government is meaningless. And if the Government does mean that the "cherished status" of American citieznship derives no more protection than that from the Constitution, its position must be rejected. See Hurst, *supra*, at 66-67 (1946).

The same thing can be said of voting in a foreign election. Voting, without more— and it has to be without more since the courts are not permitted to inquire into circumstances, motivations or consequences—is no more than a "neutral" act. Indeed, as we have pointed out above (pp. 20-22), there are many situations in which voting in a foreign election is an act which may evidence a high regard for American allegiance.

It will be urged, no doubt, that whatever may be the validity of this position as an original proposition, the law has been settled the other way by *Mackenzie* v. *Hare*, 239 U.S. 299. Voting in a foreign election, and draft evasion by leaving the country, it will be said, are no more remote from "the cardinal elements of American nationality and allegiance" than marriage to a foreigner.

We believe that the argument misconceives the nature and scope of the decision in that case. Congress had declared,

by Section 3 of the Act of March 2, 1907 (c. 2534, 34 Stat. 1228) that "any American woman who marries a foreigner shall take the nationality of her husband." The Court, it is clear, upheld the validity of that provision by reason of the common-law concept of husband and wife (239 U.S. at p. 311):

> "The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose, and, it may be, necessity, in international policy. And this was the dictate of the act in controversy."

The court was specific in recognizing (p. 311) that it was not dissenting from the language of the opinion in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703. It conceded (*ibid.*) that a change in citizenship cannot be imposed without the concurrence of the citizen. But in view of the concept of the merger of identity of husband and wife which then prevailed, the Court found the statute to be (p. 312) "one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded."

The change which forty years has wrought in the status of women—including the passage of the Nineteenth Amendment—would certainly call for a careful re-examination of the decision in *Mackenzie* v. *Hare* were it to arise again today. One need cite no further proof than that such legis-

lation, being no longer "demanded" by international considerations, has been repealed.

Nor is the Government aided by *Savorgnan* v. *United States*, 338 U.S. 491. Not only did Mrs. Savorgnan marry a foreigner, an Italian Vice Consul, but she formally and knowingly applied for and obtained foreign citizenship. As the Court noted (p. 498):

> "From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation."

The Court had little difficulty in concluding that voluntary acceptance of a foreign citizenship was enough (p. 502):

> "The petitioner, in the instant case, was a competent adult. She voluntarily and knowingly sought and obtained Italian citizenship. Her application for naturalization and her oath of allegiance were in Italian, which she did not understand, but Savorgnan did understand Italian, and he was with her and able to translate and explain them to her when she signed them. She knew that the instruments related to her citizenship and that her signature of them was an important condition upon which her marrigae depended."

Under the circumstances, we do not think the Court was too unkind when it later characterized Mrs. Savorgnan's conduct as "sign[ing] one thing and claim[ing] another". *Moser* v. *United States*, 341 U.S. 41, 47.

III

Section 401(j) Is Also Invalid Because It Imposes a Criminal Penalty Without Appropriate Constitutional Safeguards.

Section 401(j), which makes draft evasion by leaving the United States an expatriating act, is subject to an addi-

tional constitutional objection—that it imposes a punishment for a crime without affording the accused his constitutional rights of grand jury indictment, trial by jury, compulsory process for witnesses, and the like. Unlike the lawful acts of marriage and naturalization in a foreign country, which were involved in *Mackenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491, draft evasion under both the Selective Service Acts of 1940 (c. 720, 54 Stat. 894, 50 U.S.C. App. Sec. 311 (1946)) and 1948 (c. 625, 62 Stat. 622, 50 U.S.C. App. Sec. 462 (1952)) is a federal crime. Petitioner, here, has never been indicted nor convicted of that crime, yet he has had imposed on him for that offense the drastic punishment of loss of citizenship and banishment. We believe that this is beyond the constitutional power of Congress.

1. Section 401(j) has a long, separate history of its own, going back almost a century. Its earliest prototype is found in the Act of March 3, 1865, c. 79, 13 Stat. 490, which provided:

> "Sec. 21. *And be it further enacted*, That, in addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. * * * "

This statute promptly came before the courts in controversies over the right of violators to vote. The first, and leading, case under the act was *Huber* v. *Reily*, 53 Pa. St. 112 (1866), decided by Judge (later Mr. Justice) Strong. After noting that the act is "highly penal" and that it adds forfeiture of citizenship as an additional penalty to the offense described, Judge Strong concluded that the penalty could not be imposed without providing the constitutional safeguards given the accused in a criminal proceeding. Although the act made no provision for a trial and conviction of desertion or draft evasion, the court saved the statute by construing it to require that the offense charged should first be established in a criminal proceeding. His language is highly relevant here (53 Pa. St. at pp. 117-119, 120):

> " * * * I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offence and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law * * * administered by a judicial tribunal authorized to adjudicate upon it. And I cannot persuade myself that a judge of elections or a board of election officers constituted under state laws is such a tribunal * * *. Even if * * * they were to decide that he had not forfeited his citizenship, all this would not amount to an acquittal. It would not protect him against a subsequent similar accusation and trial * * *. Surely that is no trial by due process of law, the judgment in which is not final, decides nothing, but leaves the accused exposed to another trial in a different tribunal, and to the imposition by that other tribunal of the full punishment prescribed by law.
>
> * * * * *

> "It [the act] means that the forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by a court-martial, and sentence approved."

The decision was later approved, and its result adopted by this Court. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501. See also *State* v. *Symonds*, 57 Maine 148, 150 (1869); *Severance* v. *Healey*, 50 N.H. 488 (1870); *Gotcheus* v. *Matheson*, 61 N.Y. 420 (1870).

Section 401(j) is the lineal descendant of this 1865 act.[11] In 1912, the 1865 act was amended to make it inapplicable in time of peace (Act of August 22, 1912, c. 336, 37 Stat. 356), but it remained on the statute books until it was repealed, on the eve of World War II, by Section 504 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1172). One part of its provisions, relating to desertion in time of war, was reenacted in Section 401(g) of the 1940 Act.[12] Section 401(g), however, made explicit the requirement of prior criminal conviction which the courts had read into the 1865 statute.

The failure of the 1940 act to continue draft evasion, in addition to desertion, as an expatriating act led to the

---

[11] No case arising under the 1865 act involved an attempt to deport a violator of its provisions. Indeed it is not clear whether deprivation of the "rights of citizenship" simply imposed loss of civil rights or loss of nationality as well. See Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25, 26, 61-62 (1950); Comment, 64 Yale L. J. 1164, 1171 n. 38, 1178 n. 77 (1955). That it involved "rights of citizenship" rather than citizenship itself is strongly indicated by the fact that it was pitched in terms of "voluntary" relinquishment and forfeiture of the rights of citizenship, while it was not until three years later that Congress for the first time recognized the right of expatriation. Act of July 27, 1868, c. 249; 15 Stat. 223. The modern version of the 1865 act may thus be far more harsh than its Civil War predecessor. See 64 Yale L. J. 1164, 1180, n. 89.

[12] See the discussion of the Cabinet Committe report in Hearing before the House Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. pp. 491-492.

addition of Section 401(j) in 1944. The Civil War act, as amended, was referred to by the authors of the bill as justification for the measure (see, *e.g.*, Congressman Dickstein, 90 Cong. Rec. 3261). Indeed, the Government itself has described Section 401(j) to this Court as a provision which "reinstated, in effect" the act of 1865. See Brief for Respondent in *Gonzales* v. *Landon*, No. 111, October Term, 1955, pp. 43, 61.

There can be no doubt that the 1865 act was a penal measure. Nor can there be doubt that loss of citizenship under that act could not be imposed as a penalty unless trial and conviction of the offenses which it described had first been had. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; *Huber* v. *Reily*, 53 Pa. St. 112 (1866). The result, under Section 401(j), must be the same. Since petitioner here has never been convicted of the crime for which he is being punished by forfeiture of citizenship, that penalty may not be constitutionally imposed upon him.

2. We need not, however, rely exclusively on this close historical link between the act of 1865 and the present Section 401(j), highly persuasive though it be. Even were Section 401(j) devoid of antecedents, it is apparent that it was intended to be, and is, a statute which imposes "punishment" for a "crime". If that be so, it is plainly not within the power of Congress to provide that such a punishment should be assessed without the usual safeguards provided by the Constitution—trial by jury, for example—none of which was available to petitioner.[13]

---

[13] Because there have been no criminal proceedings whatever in this case, we need not consider the further question whether deprivation of citizenship followed by banishment, which the present petitioner faces, would constitute cruel and unusual punishment within the meaning of the Eighth Amendment. See Comment, 64 Yale L.J. 1164, 1187-1194. The issue was not resolved by the 1865 Act, since deprivation of the "rights of citizenship" pursuant to criminal conviction under that statute had never been followed by an attempt to banish the offender. Nor need

We may appropriately start with the definition of a crime as given in Blackstone (4 Commentaries, p. *5):

> "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. * * *.
>
> "The distinction of public wrongs from private, of claims and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."

That avoidance or evasion from military service is a "public wrong" and "a breach and violation of the public rights and duties, due to the whole community," when the whole community is preparing to battle for its own self-preservation, cannot seriously be denied. Nor can the fact that such conduct is "an act committed, or omitted in violation of a public law". Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894, 50 U.S.C. App. Sec. 311 (1940), in effect when petitioner was found to have evaded the draft,[11] declared that any person who

---

we dwell on whether Section 401(j) violates due process in that it improperly discriminates in the penalty imposed upon one who evades the draft but confines his evasion to the forty-eight states, and one who happens to go beyond these boundaries, although it may well be said, as in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, that "the law lays an unequal hand on those who have committed intrinsically the same quality of offense."

[11] Virtually identical language is contained in Section 12 of the Selective Service Act of 1948, c. 625, 62 Stat. 622, 50 U.S.C. App. Sec. 462 (1952).

> "evades registration or service in the land or naval forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment * * *."

This, of course, makes the expatriating act of draft evasion a federal felony. U.S.C., Title 18, Sec. 1.

Courts and commentators have indicated that the crucial elements in determining whether a statute is "criminal", and its santcion "punishment", is penal intent on the part of the legislature and the severity of the sanction. See, *e.g.*, *United States* v. *Lovett*, 328 U.S. 303; *Ex parte Garland*, 4 Wall. 333; Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vand. L. Rev. 603, 608-610 (1951); Comments, 64 Yale L. J. 712, 722-724 (1955), 64 Yale L. J. 1164, 1180-1182 (1955). On both grounds, Section 401(j) is a penal statute.

There can be no real doubt as to the intention of Congress that Section 401(j) was to impose a punishment for an offense against the United States. The Chairmen of both of the committees of Congress who considered the bill, and the Attorney General who recommended it, made clear that punishment for draft evasion, and not any idea that draft evasion evidenced an intention to abandon citizenship, was the motivation behind the bill. Thus Senator Russell, Chairmain of the Senate Committee on Immigration, said on the floor of the Senate (90 Cong. Rec. 7629 (1944):

> "* * * I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is

compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, *should be penalized in some measure.* This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely *impose a similar penalty* on those who are not subject to the jurisdiction of our courts * * *." (Italics supplied.)

On the House side, Congressman Dickstein, who introduced the bill and was Chairman of the House Committee on Immigration and Naturalization which reported it to the House, said (90 Cong. Rec. 3261-3262 (1944)):

"I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war and that they might have to serve in the armed forces, in the naval forces, or the marines, and in an effort to get out of such service.

* * * * *

"I want to say again that I compliment the Department of Justice for calling this matter to the attention of the committee of which I have the honor to be chairman. Any man, any American, who leaves this country

for the purpose of not serving his country in time of war *is a traitor,* in my judgment.

* * * * *

"* * * there are a lot of people, native-born as well as naturalized, who have left the country for this purpose and I say that they have no right to retain their citizenship or to be allowed to return. I say their papers and their citizenship ought to be taken away from them.

* * * * *

"* * * It seems to me that persons in that category should not be allowed to call themselves Americans or should not be allowed to be citizens of the United States of America." (Italics supplied.)

And in urging the legislation, the Attorney General said (S. Rep. No. 1075, 78th Cong., 2d Sess., p. 2):

"* * * Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much *less worthy of citizenship* than are persons who become expatriated on any of the existing grounds." (Italics supplied.)

Penal intent—intent to punish for an offense—seems apparent. And certainly, when one turns to the other criterion —the severity of the penalty—the penal nature of Section 401(j) is equally clear. Unless this Court intervenes, a native-born American will be subjected to the penalty of banishment, perhaps as severe a penalty, short of death, as can be imposed. Banishment and related sanctions have deep roots in history as severe and unusual punishment. As Blackstone has noted (1 Comm. * 138):

"* * * no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter [c. 29] declares, that no free man shall be banished, unless by the judgment of his peers, or by the law of the land."

See also 4 *Bl. Comm.* *377. And as another author states (Wines, *Punishment and Reformation* (1910) pp. 85, 86):

"* * * exile * * * is essentially an alternative for the death sentence, and has the same effect, so far as the community which desires to rid itself of a culprit is in question. Banishment may * * * be compulsory, or by legal fiction, it may be voluntary, the criminal being liable to execution if he remains at home. It was by this subterfuge that transportation was instituted, as we shall see in a subsequent chapter. * * * The Romans divided banishment into deportation and relegation; deportation was exile to a place specified, from which the banished were not allowed to depart; but relegation was simple exile, and did not involve loss of citizenship. A form of banishment called ostracism * * * existed at Athens * * * it was inflicted by popular suffrage at a special election * * *. Ostracism did not involve the confiscation of the exile's estate, as the ordinary form of banishment did * * * the mind dislikes to dwell upon acts of violence, such as have been described in this dark chapter of human nature at its worst."

The severity of punishment of this sort has likewise been noted by this Court. In *Klapprott* v. *United States*, 335 U.S. 601, while acknowledging that "denaturalization proceedings have not fallen within the technical classification of crimes"—for reasons peculiar to the plenary Congressional power over aliens which have no application to the case of a native-born American [15]—the Court observed (pp. 611-612):

> "Denaturalization consequences *may be more grave than consequences that flow from conviction for crimes* * * *. This Court has long recognized the plain fact that to deprive a person of his American citizenship is an *extraordinarily severe penalty* * * *. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty * * *. It may result also in loss of both property and life; or of all that makes life worth living' *Ng Fung Ho* v. *White*, 259 U.S. 276, 284." (Italics supplied.)

---

[15]The technical exclusion of alien deportation from classification as punishment for crimes is based on the view first articulated in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730, which carefully excepted *citizens* from its reasoning:

> "The order of deportation [of an alien] is not a punishment for crime. *It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.* It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application." (Italics supplied.)

In *Schneiderman* v. *United States*, 320 U.S. 118, the Court said of the deprivation of the "priceless benefits" that derive from the status of American citizenship (320 U.S. at p. 122):

> "In its consequences it is *more serious than* a taking of one's property, or *the imposition of a fine or other penalty*. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance." (Italics supplied.)

Only recently the Court noted that even as to naturalized citizens the constitutional validity of banishment "might be debatable" as an original proposal, but sustained it because it had been "considered closed for many years and a body of statute and decisional law has been built" upon it. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594. This Court, of course, is not similarly restricted by history as to native-born citizens. A harsh doctrine, "debatable" but for history, is not lightly to be extended in an area of cherished and fundamental rights.

That Section 401(j) does not *label* the loss of citizenship for draft evasion a "punishment" or "penalty" is unimportant. Sanctions far less severe than de-citizenship and banishment have been held to be "punishment" though not so designated by Congress. As the Court said in *Cummings* v. *Missouri*, 4 Wall. 277, 325:

> "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. * * * If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In the *Cummings* case, the Court classified disqualification from state office and various professions as "punishment" (4 Wall. at pp. 320-322):

> "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. * * *. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.
>
> * * * * *
>
> "'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.'" [4 *Bl. Comm.* *44]
>
> * * * * *
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined."

Ex parte *Garland*, 4 Wall. 333 is to the same effect (at p. 377):

> "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. Any exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

The principles of these decisions was recently applied in *United States* v. *Lovett*, 328 U.S. 303, 316:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, * * *.
>
> "Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal."

We submit, therefore, that having regard to substance rather than form, Section 401(j) must be classified as a criminal statute, and the deprivation of citizenship which it purports to exact as a punishment for draft evasion by leaving the United States as criminal punishment. Whether it can be saved, as was its Civil War prototype, by reading into it a requirement of a prior criminal conviction, and

whether, if it were to be so saved it would be subject to other fatal constitutional objections (see p. 35, n. 13, *supra*) are questions we need not now consider. Petitioner, in any event, has not been tried or convicted in any sort of criminal proceeding, and cannot, therefore, be punished.

Conclusion

We submit, therefore, that Subsections (e) and (j) of Section 401 should be held invalid as in conflict with the Constitution, and that the decision of the court below should be reversed and the case remanded for such further proceedings as may be appropriate in the light of that determination.

Respectfully submitted,

CHARLES A. HORSKY,
701 Union Trust Building,
Washington 5, D. C.,
FRED OKRAND,
A. L. WIRIN,
YALE KAMISAR,
Counsel for Petitioner.

JACK WASSERMAN,
Ass'n of Immigration and
Nationality Lawyers,
SALVATORE C. J. FUSCO,
Of Counsel.

FEBRUARY 26, 1957.

APPENDIX

Section 401 of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1137), as amended by the Acts of January 20, 1944 (c. 2, 58 Stat. 4); of July 1, 1944 (c. 368, 58 Stat. 677), of September 27, 1944 (c. 418, 58 Stat. 746), all as incorporated in Section 349 of the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267), and as further amended by the Act of September 3, 1954 (c. 1256, 68 Stat. 1146) (U.S.C., Title 8, Sec. 1481), is as follows:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

"(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 1101 (a) (27) (E) of this title; or

"(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

"(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such

entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

"(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

"(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

"(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

"(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war,

restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

"(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

"(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the president to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

"(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act."

Office - Supreme Court, U.S.
FILED
APR 2 1957
JOHN T. FEY, Clerk

LIBRARY
SUPREME COURT, U.S.

No. 572

In the Supreme Court of the United States

OCTOBER TERM, 1956

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
J. F. BISHOP,
Attorney,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Summary of argument	5
Argument:	
Introduction	10
I. The power of Congress to designate what conduct shall effect loss of nationality is not restricted to instances where the citizen desires to give up his United States citizenship, but may also be employed where it is reasonable for Congress to prescribe that loss of citizenship shall follow specified conduct by an American	13
A. The Congressional power to designate conduct which shall result in expatriation is an attribute of sovereignty which does not depend upon the individual's intention to give up his citizenship	13
B. Congress can declare that conduct shall result in loss of nationality where such conduct may lead to international embroilment or adversely affect the cardinal elements of allegiance to the United States	29
II. Congress has the constitutional power to provide that United States nationality is lost by one who remains outside the jurisdiction of the United States in time of war to evade military service, by one who votes in a foreign state, by a dual-national who serves in the armed forces of his other nation, and by a serviceman who is convicted of desertion in wartime	38
A. Section 401 (c)—service by a dual-national in the forces of his other state	38

Argument—Continued
II. Congress has the constitutional power, etc.—Con.
B. Section 401 (e)—voting in a foreign political election — Page 39
C. Subsection (j)—remaining abroad to evade military service — 40
D. Subsection (g)—deserting the armed forces — 49
III. The provisions of the expatriation statute do not involve criminal prosecution or punishment — 50
Conclusion — 58
Appendix A: Section 401 of the Nationality Act of 1940 — 59–61
Appendix B: Immigration and Naturalization Service Statistics on Expatriation — 62–63

CITATIONS

Cases:
Acheson v. *Maenza*, 202 F. 2d 453 — 26
Acheson v. *Mariko Kuniyuki*, 189 F. 2d 741, 190 F. 2d 897, certiorari denied, 324 U. S. 942 — 4, 19, 29
Acheson v. *Wohlmuth*, 196 F. 2d 866, certiorari denied, 344 U. S. 833 — 4, 19
Adler v. *Board of Education*, 342 U. S. 485 — 56
A— H—, In the Matter of, 2 I. & N. Dec. 390 — 19
American Communications Assn. v. *Douds*, 339 U. S. 382 — 56
Barsky v. *Board of Regents*, 347 U. S. 442 — 56
Bauer v. *Clark*, 161 F. 2d 397, certiorari denied, 332 U. S. 839 — 20
Burnet v. *Brooks*, 288 U. S. 378 — 16
Carver, In re, 142 Fed. 623 — 44
Cavender v. *United States*, 8 C. Cls. 281 — 44
Dos Reis v. *Nicolls*, 161 F. 2d 860 — 26
Falbo v. *United States*, 320 U. S. 549 — 47
Federici v. *Miller*, 99 F. Supp. 962 — 20
Fong Yue Ting v. *United States*, 149 U. S. 698 — 16
Francis v. *Resweber*, 329 U. S. 459 — 58
Galvan v. *Press*, 347 U. S. 522 — 57
Garner v. *Board of Public Works of Los Angeles*, 341 U. S. 716 — 56
Girouard v. *United States*, 328 U. S. 61 — 47
Goad v. *Moulton*, 67 Cal. 536, 8 Pac. 63 — 30
Gonzales v. *Landon*, 215 F. 2d 955, reversed, 350 U. S. 920 — 19, 29, 45, 46

Cases—Continued

Page

Gotcheus v. *Matheson*, 58 Barb. 152, reversed, 61 N. Y. 420 43
Griffin, Ex parte, 237 Fed. 445 25
H—, In the Matter of, 4 I. & N. Dec. 540 19
Harrisiades v. *Shaughnessy*, 342 U. S. 580 ..... 10, 57
Hawker v. *United States*, 170 U. S. 189 ..... 10, 56
Helvering v. *Mitchell*, 303 U. S. 391 ..... 10, 51
Hisao Murata v. *Acheson*, 99 F. Supp. 591, remanded, 342 U. S. 899 ..... 17, 28
Holt v. *Holt*, 59 Me. 464 44
Huber v. *Reily*, 53 Pa. 112 ..... 44, 53
Kasumi Nakashima v. *Acheson*, 98 F. Supp. 11 20
Kawakita v. *United States*, 343 U. S. 717 ..... 19, 25, 26
Kiyokuro Okimura v. *Acheson*, 111 F. Supp. 303 28
Kiyokuro Okimura v. *Acheson*, 99 F. Supp. 587, remanded, 342 U. S. 899 ..... 17, 28
Knauer v. *United States*, 328 U. S. 654 34
Kurtz v. *Moffit*, 115 U. S. 487 ..... 44, 53
Lapides v. *Clark*, 176 F. 2d 619, certiorari denied, 338 U. S. 860 ..... 20, 33, 48
Lichter v. *United States*, 334 U. S. 742 47
Mackenzie v. *Hare*, 239 U. S. 299 ..... 4, 6, 7, 14, 15, 17, 24, 26, 30–31, 33, 48, 50
Marler v. *Eby*, 264 U. S. 32 57
Mandoli v. *Acheson*, 344 U. S. 133 ..... 19, 22, 23, 25, 26
Marcello v. *Bonds*, 349 U. S. 302 57
Marcus, United States ex rel. v. *Hess*, 317 U. S. 537 ..... 55, 58
Marlow v. *Barlow*, 53 Cal. 456 31
McCafferty v. *Guyer*, 59 Pa. 109 ..... 44, 53
Mendoza-Martinez v. *Mackey*, 238 F. 2d 239, pending on petition for certiorari, this Term, No. 623 ..... 5, 10, 11, 14, 19, 27, 29, 37, 40, 50, 58
Minoru Hamamoto v. *Acheson*, 98 F. Supp. 904 20
Miranda v. *Clark*, 180 F. 2d 257 ..... 19, 29
Nishikawa v. *Dulles*, 235 F. 2d 135, pending on certiorari, this Term, No. 415 ..... 5, 7, 10, 11, 20, 27, 29, 37, 38, 50, 58
O'Sullivan v. *Felix*, 233 U. S. 318 56
Perkins v. *Elg*, 307 U. S. 325 ..... 18, 21, 23, 26
Revedin v. *Acheson*, 194 F. 2d 482, certiorari denied, 344 U. S. 820 ..... 20, 25

Cases—Continued

	Page
Rex Trailer Company v. *United States*, 350 U. S. 148	10, 55, 57
Sacher v. *Association of the Bar*, 347 U. S. 388	56
Savorgnan v. *United States*, 338 U. S. 491	6, 14, 18, 20, 22, 23, 24–25, 26, 32
Scavone v. *Acheson*, 103 F. Supp. 59	19
Selective Draft Law Cases, 245 U. S. 366	47
Severance v. *Healey*, 50 N. H. 448	44
Shelley v. *United States*, 120 F. 2d 734	42
State v. *Symonds*, 57 Me. 148	44, 53
Summers, In re, 325 U. S. 561	47
Trop v. *Dulles*, No. 710, this Term	5, 10, 19, 27, 35, 49, 50
United Public Workers v. *Mitchell*, 330 U. S. 75	56
United States v. *Bland*, 283 U. S. 636	47
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	15
United States v. *Macintosh*, 283 U. S. 605	47
United States v. *Schwimmer*, 279 U. S. 644	47
United States v. *Snow*, 27 Fed. Case. (No. 16350) 1255, 1256	44
United States v. *Wong Kim Ark*, 169 U. S. 649	20–21
Vidales v. *Brownell*, 217 F. 2d 136	19, 29
Weedin v. *Chin Bow*, 274 U. S. 657	42
Weems v. *United States*, 217 U. S. 349	58
Wilkerson v. *Utah*, 99 U. S. 130	58
Constitution, Federal and State statutes:	
Constitution of the United States:	
Art. 1, Sec. 8	16, 43
Fifth Amendment	29
Fourteenth Amendment	21
Nineteenth Amendment	30
Federal statutes:	
Act of March 3, 1865, 13 Stat. 490, Sec. 21	16, 41, 42, 43, 44, 45, 46, 49, 52
Act of July 27, 1868, 15 Stat. 223, Rev. Stat. § 1999, 8 U. S. C. 800	16, 23, 41, 42, 43
Act of July 2, 1940, 54 Stat. 715	42
Act of August 22, 1912, 37 Stat. 356	44
Act of September 3, 1954, 68 Stat. 1146	23
Citizenship Act of March 2, 1907, 34 Stat. 1228	15, 17, 23, 32

Constitution, Federal and State statutes—Continued
Federal statutes—Continued
Immigration and Nationality Act of 1952, 66 Stat. 163: Page
Sec. 349 (8 U. S. C. 1481) 2
Secs. 349–357 (8 U. S. C. 1481–1489) 23
Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677), and September 27, 1944 (58 Stat. 746), 8 U. S. C. (1946 ed.) 501, *et seq.*:
Sec. 401 23, 36, 37, 38, 39, 51
(a) 36, 59
(b) 33, 60
(c) 7, 10, 28, 33, 36, 50, 60
(d) 28, 33, 36, 60
(e) 2, 7, 10, 27, 28, 33, 34, 50, 60
(f) 36, 60
(g) 8, 9, 10, 12, 44, 49, 50, 52, 53, 60
(h) 33, 61
(i) 36, 61
(j) 2, 7, 8, 9, 10, 11, 12, 27, 43, 44, 45, 46, 49, 50, 53, 58, 61
Sec. 404 22
Sec. 504 44
Revised Statutes 1993 42
Revised Statutes 1996, 1998 42
54 Stat. 894 58
54 Stat. 1163 51
60 Stat. 341 58
18 U. S. C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387 56
50 U. S. C. (1946 ed.) 311, App 58
California Constitution and statutes:
California Constitution of 1849, Art. XI, Sec. 14 30
California Constitution of 1879, Art. XX, Sec. 8 30
California Constitution of 1879, Amendment of 1911, Art. II, Sec. 1 31
California Civil Code:
Sec. 157 30
Sec. 158 30
Sec. 162 31

Constitution, Federal and States statutes—Continued
California Constitution and statutes—Continued
California Civil Code—Continued
Page
Sec. 171a 31
California Penal Code, Sec. 26 31
Congressional material:
86 Cong. Rec. 11942–11949 52
86 Cong. Rec. 11945–6 52
86 Cong. Rec. 12430–12431 52
90 Cong. Rec. 3256 45
90 Cong. Rec. 7628–7629 46
90 Cong. Rec. 7725–7726 46
H. Doc. No. 326, 59th Cong., 2d sess.:
pp. 3, 23 ..... 32, 34
p. 159 43
Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H. R. 6127:
pp. 38, 132–133 43
p. 405 18
p. 409 52
p. 489 52
p. 491 ..... 39, 43
H. Rep. No. 4784, 59th Cong., 1st sess 32
H. Rep. No. 6431, 59th Cong., 2d sess 32
H. Rep. No. 1229, 78th Cong., 2d sess 43, 45, 46, 53–55
S. Rep. No. 2150, 76th Cong., 3d sess 52
S. Rep. No. 1075, 78th Cong., 2d sess 45, 53
Miscellaneous:
Annual Reports to the Attorney General of the Commissioner of Immigration and Naturalization for the years ended June 30, 1949, and June 30, 1950 63
Annual Report to the Attorney General of the Commissioner of Immigration and Naturalization for the year ended June 30, 1956 62
Citizenship of Grover Cleveland Bergdoll, 39 Op. A. G. 303 44
Comment, 64 Yale L. J. 1164, 1185–1186 ..... 16, 50
Executive Order No. 6115 (April 25, 1933) 17
Flournoy, *Naturalization and Expatriation* (1922), 31 Yale L. J. 702, 848 22

Miscellaneous—Continued

	Page
III Hackworth, *Digest of International Law* (1942):	
Pp. 276–279	43, 44
Secs. 242–250	22
Hurst, *Can Congress Take Away Citizenship?*, 29 Rocky Mtn. L. Rev. 62	50
II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1945 ed.), Secs. 376–387A	22
III Moore, *Digest of International Law* (1906):	
Secs. 431–469	22
Sec. 468, pp. 718–730	32
Moore, *The Principles of American Diplomacy*, ch. VII, reported in IV Collected Papers of John Bassett Moore, pp. 388–406	22
Sharon, *Loss of Citizenship by Draft Dodgers*, 5 Monthly Review of the Immigration and Naturalization Service 97 (Feb. 1948)	49
Tsiang, *The Question of Expatriation in America prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science, Series LX, No. 3	22

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 15–17) is reported at 235 F. 2d 364. The findings of fact and conclusions of law of the District Court appear at pages 9 to 12 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1956 (R. 18). The petition for a writ of certiorari was filed on October 10, 1956, and was granted on November 13, 1956 (R. 19). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether Congress has the constitutional power to provide, as it did in Section 401 (j) of the National-

ity Act of 1940, for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

2. Whether Congress has the constitutional power to provide, as it did in Section 401 (e) of the Nationality Act of 1940, for the expatriation of a native-born citizen who votes in a political election in a foreign state.

STATUTE INVOLVED

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746 (8 U. S. C. (1946 ed.) 801), provided in pertinent part:[1]

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

[1] The provision is now incorporated in Section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U. S. C. 1481 (a).

The text of the entirety of Section 401 of the Nationality Act is set out in Appendix A, *infra*, pp. 59–61.

STATEMENT

Petitioner seeks reversal of a judgment of the Court of Appeals for the Ninth Circuit (R. 18) affirming a judgment of the District Court for the Northern District of California (R. 12–13) which denied petitioner's request for a judgment declaring him to be a citizen of the United States (R. 1–3). The undisputed findings of fact by the District Court (R. 9–11) may be summarized as follows:

Petitioner was born in El Paso, Texas, in 1909, of Mexican-born parents. He departed to Mexico in 1919 or 1920 with his parents, and resided there continuously until 1952. He voted in a political election in Mexico in 1946. He married a Mexican national in 1932. His wife and seven children have at all times resided in Mexico. (R. 9–11.)

In July 1943, petitioner applied for admission to the United States as a Mexican alien laborer, stating that he was a citizen of Mexico, born in Encarnacion de Diaz, Jalisco, Mexico (although having been informed in 1928 that he was born in Texas). He returned to Mexico the following March (1944), but returned to the United States within a month as a laborer, again claiming native Mexican citizenship. He departed to Mexico in November 1944. (R. 10.)

Petitioner knew of the outbreak of World War II and of the duty of all male citizens of the United States to register under the selective service laws. He remained outside the United States from Novem-

ber 1944 to July 1947 to evade service in the armed forces (R. 10–11).

After the war, in 1947, petitioner sought to enter the United States as a United States citizen. Both before the Board of Special Inquiry and in his appeals to the Assistant Commissioner and to the Board of Immigration Appeals, petitioner admitted that he had remained outside the United States to avoid military service and that he had voted in Mexico. He was excluded on the ground that he had expatriated himself. (R. 10–11.)

In June 1952, petitioner entered the United States as a laborer and citizen of Mexico. He surrendered to immigration authorities in May 1953, but claimed that he was a citizen of the United States by birth. He was ordered deported. (R. 11.)

In January 1954, petitioner filed the instant complaint for a declaratory judgment to establish his United States nationality (R. 1–3). The District Court denied the complaint, holding that petitioner had lost his nationality under the Nationality Act of 1940, as amended, by remaining outside the jurisdiction of the United States, in time of war, for the purpose of evading service in the armed forces of the United States, and by voting in Mexico (R. 11–12). The Court of Appeals affirmed (R. 15–17), relying largely upon *Mackenzie* v. *Hare*, 239 U. S. 299; *Acheson* v. *Wohlmuth*, 196 F. 2d 866 (C. A. D. C.), certiorari denied, 344 U. S. 833; and *Acheson* v. *Mariko Kunikuki*, 189 F. 2d 741 (C. A. 9), certiorari denied, 342 U. S. 942.

SUMMARY OF ARGUMENT

This case and Nos. 415, 623, and 710 present the issue of the validity of four expatriation provisions of Section 401 of the Nationality Act of 1940—(subsection (c)) service by a dual-national in the armed forces of his other state; (subsection (e)) voting in a foreign political election; (subsection (g)) desertion in wartime; and (subsection (j)) departing from or remaining outside the country to evade military service.[2] We discuss the validity of all of these provisions in this brief.

I

The power of Congress to designate what conduct shall effect loss of nationality is not restricted, as the petitioners contend, to instances where the citizen desires to give up his American citizenship, but may also be employed where it is reasonable for Congress to prescribe that loss of citizenship shall follow specified conduct by an American.

A. The power to expatriate is an implied attribute of sovereignty with which the United States is invested as a nation, even though such power is not

[2] The instant case involves loss of United States nationality under the 1940 Act not only by reason of remaining in a foreign country in wartime to evade military service, but also by reason of voting in the foreign country. The companion cases of *Nishikawa* v. *Dulles*, No. 415, this Term, and *Trop* v. *Dulles*, No. 710, this Term, involve, respectively, loss of citizenship by reason of Nishikawa's service in the Japanese Army from March 1941, to August 1945, and by reason of Trop's wartime desertion of the United States Army. No. 623, *Mendoza-Martinez* v. *Mackey*, like the instant case, involves remaining abroad to evade the draft.

expressly stated in the Constitution. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491. Congress may—on grounds which are reasonable, giving due consideration to the precious character of American citizenship—fix the conditions which result in loss of nationality, regardless of the subjective intent of the individual citizen who performs the expatriating act. While the courts have found that Congress intended the act which results in expatriation to be a voluntary one, they have expressly held that the person voluntarily performing the specified act loses his nationality by the performance of such act, irrespective of his knowledge, intent, or desire that he would thereby renounce United States nationality. *E. g.*, *Savorgnan* v. *United States*, *supra*. The general power of Congress in this area has been assumed for almost a century; and the consistent current of responsible judicial decision has recognized the authority of Congress to impose loss of nationality on citizens performing certain acts voluntarily.

B. In exercising this power, Congress can declare that conduct shall result in loss of nationality where such conduct may lead to international embroilment or adversely affect the cardinal elements of allegiance to the United States. Though this authority must be reasonably exercised, it is not restricted, either historically or on principle, to instances in which the citizen acquires another nationality or allegiance, but it can extend to other cases in which "an act [of a citizen] may bring the Government into [foreign] embarrassments and, it may be, into controversies"

(*Mackenzie* v. *Hare*, *supra*, 239 U. S. at 316). Also, Congress may take account of conduct which is so inconsistent with the prime obligations of citizenship, or so denies the cardinal aspects of allegiance to this country, that it is reasonable to provide that a citizen committing such acts shall no longer remain an American.

II

Under these general standards, Congress has the constitutional power to adopt the four specific provisions of Section 401 of the 1940 Nationality Act which are involved in this series of cases. Each provision is a reasonable condition for loss of nationality.

A. Service by a dual-national in the armed forces of his other state (Section 401 (c)) leads to international conflict and may directly pit one allegiance against the other—as in Nishikawa's case, No. 415.

B. Voting in a foreign political election (Section 401 (e)) may likewise be reasonably thought to indicate too close an attachment to the foreign country, and too active a participation in its political affairs.

C. Prescribing loss of nationality for those who remain out of the country to avoid military service in wartime (Section 401 (j)) is also a reasonable exercise of the power of Congress, in the national interest, to fix the conditions of expatriation. Such persons, by their own conduct, place themselves in a class significantly different from other citizens, different even from other groups of evaders within the country for whom the ordinary criminal sanctions are available. They also present a problem in international relations since, so far as other countries are concerned, they

remain United States citizens, while, so far as this nation is concerned, they have refused to meet the obligations of citizenship.

Ever since the Civil War, the United States has felt the need for legislation of this type. A statute in force from 1865 to 1940 prescribed forfeiture of "rights of citizenship" for those who left the district of registration to evade the draft, apparently even if they did not leave the country. The constitutionality of that statute has consistently been assumed by the courts and it was legislatively and administratively treated as a full expatriation statute.

Section 401 (j) was added to the Nationality Act in 1944 because draft evasion in World War II revealed the same occasion as had existed in earlier times of emergency. The provision applies only to those draft evaders who depart or remain out of the country to avoid service. Since readiness to serve in the forces—claims of conscience aside—has always been a cardinal element of our citizenship, such draft evasion is a repudiation of the most important demand of allegiance, and an expression of preference for whatever profection another country may give in place of fulfillment of a prime duty of American citizenship. One who intentionally chooses foreign residence in preference to the obligations of citizenship is not in a position to challenge the right of Congress to implement his choice by recognizing the severance of the cords of the allegiance he has rejected.

D. Section 401 (g), prescribing loss of nationality for deserting the service in wartime, stems from the

same source as subsection (j), *supra*, and in large part is supported by the same considerations.

III

These provisions of Section 401 of the Nationality Act of 1940 do not involve criminal prosecution or punishment, and therefore should not be tested by the constitutional provisions which apply to crime.

A. There is no adequate ground for holding that Congress actually intended these provisions as *penal* sanctions. They are not worded in that fashion, and the legislative history shows that the drafters expressly disavowed a punitive purpose. The dominant objective of Congress was simply to determine what classes of persons should, because of their specific conduct, no longer be considered as citizens and entitled to treatment and protection as such. This was true, not only generally with respect to the expatriation provisions of the Nationality Act of 1940, but also specifically with respect to Section 401 (g) (which was originally part of the 1940 Act) and to Section 401 (j) (which was added in 1944).

B. Punishment is not involved merely because Congress imposes a non-penal disability or disqualification, following specified criminal conduct. Civil regulations based on past conduct are not invalid, or transformed into punitive sanctions, where the legislators have a valid non-penal objective and do not intend to inflict punishment, even though some deterrence of criminal conduct may also ensue. Scarcely any civil consequence of statutes relating to licensing, damages, or

the like, can avoid—or need avoid—incidental effects of deterrence. Cf. *Hawker* v. *United States*, 170 U. S. 189; *Helvering* v. *Mitchell*, 303 U. S. 391; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Rex Trailer Co.* v. *United States*, 350 U. S. 148. Here, Congress intended to recognize the end of the citizenship of those whose actions indicated allegiance to, or too intimate a connection with, a foreign state, or whose conduct showed them unworthy to remain Americans. That was an adequate non-penal objective.

ARGUMENT

INTRODUCTION

1. This case presents solely the issue of the constitutionality of Section 401 (e) and Section 401 (j) of the Nationality Act of 1940 (*supra*, p. 2).[3] *Mendoza-Martinez* v. *Mackey*, No. 623, pending on petition for certiorari, also involves the constitutionality of Section 401 (j). *Nishikawa* v. *Dulles*, No. 415, concerns the validity of Section 401 (c) of the 1940 Act. The validity of Section 401 (g) is raised in *Trop* v. *Dulles*, No. 710. The Court therefore has before it the constitutionality of four of the ten separate expatriation provisions included in Section 401 of the 1940 Act (as amended)—(subsection (c)) service by a dual-national in the armed forces of his other state; (subsection (e)) voting in a foreign political election; (subsection (g)) desertion in time

[3] No other question was presented to or decided by the Court of Appeals (R. 15), or presented by the petition for certiorari, or is argued in petitioner's brief on the merits.

of war; and (subsection (j)) departing from or remaining outside the country to evade military service.[4] We shall present our main argument on the validity of all of these provisions in this brief, leaving to our brief in No. 710 some additional comments.[5]

2. The pervading theme of petitioner's argument on constitutionality—as of that of the petitioners in Nos. 415 and 710, and of the *amici* (including the petitioner in No. 623)—is that Congress cannot, under our Constitution, provide for the loss of American nationality (at least of a native-born citizen) unless the particular individual has the intention or desire to give up his American citizenship. On this assumption, the briefs make elaborate arguments purporting to show (i) that the particular conduct prescribed in the four expatriation provisions of Section 401 as causing loss of nationality does not, in itself, indicate that the petitioners desired or intended to lose their American citizenship, or that they personally "waived" their right to citizenship; (ii) that no individual proof of such desire, intention, or personal "waiver" on the part of these petitioners was made in these cases; and (iii), finally, that to the extent the four subsections of Section 401 were designed by Congress to "create"

[4] The full text of Section 401 of the Nationality Act of 1940 is set forth in Appendix A, *infra*, pp. 59–61.

[5] Our brief in No. 415 does not discuss the constitutional issue in that case but refers to this brief. Certiorari has not been granted in No. 623 and it has not been set for argument; accordingly, we are filing no brief in that case.

a "presumption" of such personal intention or desire to give up American citizenship (or of such personal "waiver" of that right), the statute is invalid because, first, the conduct defined in the four subsections cannot reasonably be said to give rise to such an inference, and, second, the statute does not permit the "presumption" to be defeated or overcome by a showing that the particular individual did not personally intend to give up his citizenship.

In our view, the petitioners' basic assumption—that no American can be expatriated unless he personally wishes to give up his citizenship—is wholly groundless, and therefore their subsidiary contentions must all fall as unsupportable. For this reason, we shall not seek to meet these subordinate points—which could have validity only if the fundamental postulate were sound—but shall directly challenge that postulate, and then show the proper foundation for federal expatriation legislation and the power of Congress in this field (Point I, *infra*). In the light of this Congressional power—which is not limited to instances in which the individual desires to give up or lose his citizenship—we shall discuss the reasons for, and the bases of, the four expatriation provisions involved in this series of cases (Point II, *infra*). In Point III, *infra,* we deal with the argument, made largely with respect to Section 401 (g) and Section 401 (j), that in those instances expatriation is an invalid punishment or penalty.

I

THE POWER OF CONGRESS TO DESIGNATE WHAT CONDUCT SHALL EFFECT LOSS OF NATIONALITY IS NOT RESTRICTED TO INSTANCES WHERE THE CITIZEN DESIRES TO GIVE UP HIS UNITED STATES CITIZENSHIP, BUT MAY ALSO BE EMPLOYED WHERE IT IS REASONABLE FOR CONGRESS TO PRESCRIBE THAT LOSS OF CITIZENSHIP SHALL FOLLOW SPECIFIED CONDUCT BY AN AMERICAN

A. THE CONGRESSIONAL POWER TO DESIGNATE CONDUCT WHICH SHALL RESULT IN EXPATRIATION IS AN ATTRIBUTE OF SOVEREIGNTY WHICH DOES NOT DEPEND UPON THE INDIVIDUAL'S INTENTION TO GIVE UP HIS CITIZENSHIP

As indicated above, we squarely challenge the main theory of the petitioners' attack—that Congress has no independent power to impose loss of nationality for designated actions, but can do no more in this area than implement or aid the citizen's own desire or intention to give up his citizenship. In our view, we *are* "dealing with a situation in which Congress has undoubted power to declare substantive law" (Pet. Br. in No. 572, p. 27).

1. At the outset, it is significant to point out explicitly—because it bears on the soundness of the basic assumption of the case against the statute—that the present petitioner does not stand wholeheartedly on the proposition that no American can be expatriated unless he desires or intends to lose his nationality. Petitioner's brief pointedly assumes that an American who accepts naturalization in another country loses his United States citizenship even though he may affirmatively wish to keep it (along

with his new nationality) (Pet. Br. in No. 572, pp. 13–14, 31), and that an American woman who married a foreigner in the United States could be expatriated (when the law so provided) even though she desired to retain her American citizenship (Pet. Br. in No. 572, pp. 29–30).[6]

These important deviations from the fundamental theory of petitioner's case are compelled, no doubt, by the two leading decisions of this Court in this field—*Mackenzie* v. *Hare*, 239 U. S. 299 (marriage of an American woman to an alien) and *Savorgnan* v. *United States*, 338 U. S. 491 (acquisition of foreign nationality by naturalization)—both of which upheld expatriation despite the claim, *and the express showing*, that the individual wished to remain an American. These two rulings (on the first of which Congress relied when it enacted the Nationality Act of 1940 and both of which supported Congress in 1952) demonstrate that, as petitioner admits by recognizing the exceptions, the touchstone for expatriation is, not the citizen's personal desire with respect to his citizenship or his words of allegiance, but his voluntary *conduct*. While the particular act upon which expatriation rests must, at least under Section 401 of the 1940 Act, be a voluntary one, the person freely committing the expatriating act need not have the subjective intent to expatriate himself, *i. e.*, to choose another allegiance over that of this country or to renounce his American nationality. If he freely does

[6] Somewhat less directly, petitioner in No. 623, in his *amicus* brief here (pp. 14 *ff*), makes the same concession as to the American woman who married an alien.

the act which Congress has specified as leading to a loss of nationality, and if that act has reasonably been so found by Congress, then the doing of the act results in loss of his United States nationality, whatever the internal feeling (or total absence of feeling) of the doer as to his adherence to American citizenship.

2. A primary argument made to support the basic postulate of the opposing briefs is that the Congressional power over expatriation is necessarily hobbled because it is not expressly spelled out in the Constitution, and must therefore be limited to helping the citizen to expatriate himself if he so desires. This contention was answered forty years ago in *Mackenzie* v. *Hare, supra,* upholding the validity of the expatriation (under the Act of March 2, 1907, 34 Stat. 1228, c. 2534) of a native-born woman upon her marrying an alien, even though she had no intent or desire to expatriate herself and never left the United States. The Court said (239 U. S. at 311):

> But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.

The doctrine of implied powers in the field of foreign relations, thus firmly and pertinently enunciated in *Mackenzie,* is, of course, one of long standing and great breadth. See *e. g., United States* v. *Curtiss-*

Wright Corp., 299 U. S. 304, 318; *Burnet* v. *Brooks*, 288 U. S. 378, 396; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 705 *ff.* Cf. the Brief for the United States (pp. 32–35) in *United States* v. *Guy W. Capps, Inc.*, Oct. Term, 1954, No. 14. Other nations, it is undeniable, have the power to prescribe loss of nationality in appropriate cases, and this country must likewise have that general authority, unless (as is not the case) some specific constitutional provision forbids.[7] In addition to the authority inherent in this country as a nation, Congress may also call (in appropriate instances) upon various specific powers such as the war power, the power to raise and support armies, and the power over naturalization.

Though Congress did not legislate generally on the subject of loss-of-nationality during the 19th century—except to confirm the *right* of voluntary expatriation in the Act of July 27, 1868, 15 Stat. 223 (*infra*, pp. 23, 41) and to enact the deserter-draft evader Act of March 3, 1865, 13 Stat. 490 (*infra*, pp. 41 *ff*)[8]—the existence of general power in this area was assumed, particularly after the Civil War, in the presentation of various bills in Congress, and in suggestions by successive Presidents that legislation be

[7] The Necessary and Proper clause applies to this power as it does to all of the powers of Congress. See Comment, 64 Yale L. J. 1164, 1185–1186.

[8] Cases under the 1865 deserter-draft evader statute, and Congressional treatment of that act, recognize it as an expatriation enactment. See *infra*, pp. 42–44.

adopted. Treaties also provided for loss of nationality as, for instance, by return of a naturalized American to his former country. The Citizenship Board of 1906[9] appeared to have no doubt as to Congressional authority, nor did the Congress which passed the expatriation Act of March 2, 1907 (involved in the *Mackenzie* case).

Mrs. Mackenzie did raise a fundamental challenge in 1915, but the power of the United States, as a nation, to fix the conditions of loss of nationality was not seriously questioned after the *Mackenzie* decision until a relatively short time ago.[10] The power was recognized by the Cabinet Committee which supervised the drafting of the proposed nationality code which ultimately became the Nationality Act of 1940, as well as by the Congress which enacted that statute. The matter of expatriation was under study, together with other aspects of nationality, in the Departments of State, Justice, and Labor from April 1933 until 1938. See Executive Order No. 6115 (April 25, 1933). In 1938, the President transmitted to Congress a Report on the Revision and Codification of the Nationality Laws of the United States, together with a code, prepared by the Secretaries of State (Secretary Hull)

[9] On the Citizenship Board of 1906, see *infra*, p. 32.

[10] The first published suggestion of invalidity of which we are aware came in the opinions of *Kiyokuro Okimura* v. *Acheson* and *Hisao Murata* v. *Acheson*, 99 F. Supp. 587 and 591 (D. Haw.), discussed *infra*, pp. 27–29. These decisions were rendered on September 12, 1951.

and Labor (Secretary Perkins), and the Attorney General (Attorney General Cummings). (See the Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H. R. 6127, pp. 405, *et seq.*, for the text of the report and the proposed code.) This Cabinet Committee recommended the enactment of most of the provisions of Section 401 of the 1940 Act, including three of those under attack in these cases.

The Congressional power was also recognized in *Savorgnan* v. *United States,* 338 U. S. 491, in which this Court upheld the expatriation of a native-born citizen as against her contention that she did not intend to renounce her citizenship by obtaining Italian citizenship while in the United States and then residing abroad. In *Perkins* v. *Elg,* 307 U. S. 325, the Court, in sustaining a claim of retention of citizenship, likewise recognized the power to expatriate, stating (307 U. S, at 329):

> [C]itizenship [at birth] must be deemed to continue unless she has been deprived of it through the operation of *a treaty or congressional enactment* or by her voluntary action in conformity with applicable legal principles. [Emphasis added.]

And again, at p. 334:

> To cause a loss of that citizenship *in the absence of treaty or statute having that effect,* there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice. [Emphasis added.]

See, also, *Kawakita* v. *United States*, 343 U. S. 717, 727–730; *Mandoli* v. *Acheson*, 344 U. S. 133, 136–137, 139, and (dissent) 140.

The lower courts and the administrative authorities have long proceeded upon the basis of the existence of the power. Thus, the loss of nationality by reason of a stay in a foreign country to evade military service has been affirmed in *Gonzales* v. *Landon*, 215 F. 2d 955 (C. A. 9), reversed on other grounds, 350 U. S. 920; *Vidales* v. *Brownell*, 217 F. 2d 136 (C. A. 9); *Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239 (C. A. 9), pending on petition for certiorari, this Term, No. 623; and see *In the Matter of A–H–*, 2 I. & N. Dec. 390, 395–396, 400. Desertion in time of war has been sustained as a basis of loss of nationality over a long period of time (see *infra*, pp. 41 *ff*), and most recently by the Second Circuit in *Trop* v. *Dulles*, pending on certiorari, No. 710, this Term; for an administrative application of the provision, see *In the Matter of H–*, 4 I. & N. Dec. 540.

Numerous decisions have sustained loss of nationality by voting in a foreign country. *E. g.*, *Acheson* v. *Wohlmuth*, 196 F. 2d 866, 871 (C. A. D. C.), certiorari denied, 344 U. S. 833; *Acheson* v. *Mariko Kuniyuki*, 189 F. 2d 741, 744 (C. A. 9), 190 F. 2d 897 (C. A. 9), certiorari denied, 342 U. S. 942; *Miranda* v. *Clark*, 180 F. 2d 257, 259 (C. A. 9) (in which the court stated that the statutory provisions "bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation"). In *Scavone* v. *Acheson*, 103 F. Supp. 59, 61 (S. D. N. Y.),

the citizen spent most of her life in a "tiny rural area" with "little schooling" but was nevertheless subjected to the consequence of her act in voting in a single foreign election; in *Kasumi Nakashima* v. *Acheson*, 98 F. Supp. 11, 12 (S. D. Cal.), the motivation to cooperate with the United States was similarly insufficient to avert loss of nationality.

Service in a foreign army has likewise often been sustained as a proper basis for loss of nationality. *E. g., Bauer* v. *Clark*, 161 F. 2d 397, 404 (C. A. 7), certiorari denied, 332 U. S. 839; *Nishikawa* v. *Dulles*, 235 F. 2d 135, 141 (C. A. 9), pending on certiorari, this Term, No. 415; *Minoru Hamamoto* v. *Acheson*, 98 F. Supp. 904, 905 (S. D. Cal.); *Federici* v. *Miller*, 99 F. Supp. 962, 963–964 (W. D. Pa.). *Revedin* v. *Acheson*, 194 F. 2d 482 (C. A. 2), certiorari denied, 344 U. S. 820, like *Savorgnan, supra,* upheld the expatriation of an American woman who acquired Italian nationality, despite her lack of intent to give up her United States citizenship.

Noteworthy, also, is the decision in *Lapides* v. *Clark*, 176 F. 2d 619 (C. A. D. C.), certiorari denied, 338 U. S. 860, which affirmed as a basis for loss of nationality residence abroad for five years by a naturalized citizen of the United States. The dissent of Judge Edgerton, directed solely against the differentiation between native-born and naturalized citizens, gave express recognition that, "Congress may expatriate citizens on reasonable grounds. No doubt these may include five years' residence abroad."

3. Petitioner's reliance (Pet. Br. 14–15) upon *United States* v. *Wong Kim Ark*, 169 U. S. 649, in this

connection, is misplaced. That case held only that the provision of the Fourteenth Amendment that all persons born in the United States are citizens of the United States precluded any power in Congress to prevent some of the persons so born in the United States from being citizens at birth, *e. g.*, persons born of Chinese parents. Even in that decision, however, the Court recognized loss of nationality on the basis of subsequent acts of the citizen, by quoting the pertinent pleading (169 U. S. at 705) "that he has never done or committed any act or thing to exclude him [from the United States]." That Congress cannot change the effect of birth as conferring citizenship does not mean that Congress may not specify the voluntary adult action which will result in subsequent loss of nationality. See *Perkins* v. *Elg*, 307 U. S. 325, 334. The Fourteenth Amendment does not, in terms, forbid the enactment of expatriation legislation, nor does it imply that Congress is powerless in this field. The purposes of the provision were simply to confirm the citizenship of Negroes and to put into constitutional form the long-standing position of this country, in accord with the *jus soli*, that persons born on American soil are Americans. See 169 U. S. at 675–6, 687–8, 693. Appropriate expatriation legislation does not conflict with those objectives, or with any other provision of the Consitution."

[11] Petitioners constantly stress the "constitutional" right of the native-born American to his citizenship—forgetting that the Fourteenth Amendment declares that "All persons born *or naturalized* in the United States, and subject to the jurisdiction thereof, are citizens of the United States * * *." (Emphasis added.) We mention this in order to point out that

4. (*a*). Petitioners' assertion of the completely controlling effect of the citizen's desire to retain his citizenship doubtless stems from an incorrect equation of all loss-of-nationality with the *right* of persons voluntarily to put off United States nationality. In the course of our development as a nation, the *right* of the individual to renounce his nationality was initially emphasized because we are a nation of immigrants and our chief interest, in the first part of the 19th century, was to secure from other countries recognition of the single status of our naturalized citizens as United States nationals, freed from all legal ties, duties, or allegiance to the states of their original citizenship. See *Savorgnan* v. *United States*, 338 U. S. 491, 497–499; *Mandoli* v. *Acheson*, 344 U. S. 133, 135–6.[12]

But Congress has also been increasingly concerned

---

the naturalized citizen also has a "constitutional" right to his citizenship, and that petitioners' arguments must therefore affect the special expatriation provisions applicable to naturalized citizens (*e. g.*, Sections 404, *et seq.*, of the 1940 Act)—at least insofar as those provisions came into operation after the grant of naturalization to the particular person. So far as petitioners' theory is concerned, there is no difference between the status of the native-born citizen and of the naturalized citizen: all the expatriation provisions must fall.

[12] The earlier development of the general American doctrine of expatriation, with its vicissitudes before the 1850's, is described in III Moore, *Digest of International Law*, Secs. 431–469; III Hackworth, *Digest of International Law*, Secs. 242–250; II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1945 ed.), Secs. 376–387A; Moore, *The Principles of American Diplomacy*, ch. VII, reported in IV Collected Papers of John Bassett Moore, pp. 388–406; Flournoy, *Naturalization and Expatriation* (1922), 31 Yale L. J. 702, 848; Tsiang, *The Question of Expatriation in America prior to 1907* (1942), Johns Hopkins University

with the other side of the coin—with those Americans who, by their voluntary acts, have shown that they should no longer be citizens of the United States even if they desire to remain such. During the Civil War, Congress forfeited the rights of citizenship of deserters and draft-evaders,[13] and in the Citizenship Act of 1907, 34 Stat. 1228, Congress, after considerable study, enacted general legislation with respect to loss of nationality by reason of various types of acts.[14] From 1940 to 1952, the expatriation provisions were set forth in Section 401 of the Nationality Act of 1940 (*infra*, pp. 59–61); since December 1952, the controlling provisions have been those of Sections 349–357 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1481–1489 (added to by the Act of Sept. 3, 1954, 68 Stat. 1146).[15]

As we have already pointed out (*supra*, pp. 13–15), in applying and sustaining these provisions, the courts

---

Studies in Historical and Political Science, Series LX, No. 3; Brief for the Petitioners, pp. 20–27, in *Perkins* v. *Elg*, Oct. Term, 1938, No. 454; Brief for the Respondents, pp. 29 *ff.*, in *Savorgnan* v. *United States*, Oct. Term, 1949, No. 48; Brief for the Respondent, pp. 22 *ff.*, in *Mandoli* v. *Acheson*, Oct. Term, 1952, No. 15.

[13] This statute is discussed in detail, *infra*, pp. 41 *ff.*

[14] *I. e.*, obtaining naturalization in a foreign country; taking an oath of allegiance to a foreign state; an American woman's marrying a foreigner.

[15] The Act of July 27, 1868, 15 Stat. 223, Rev. Stat. § 1999, 8 U. S. C. 800, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people," but did not otherwise define what constituted expatriation. Until the 1907 Act was adopted, there was no general Congressional measure prescribing specific modes in which expatriation would be effected—aside from the deserter and draft-evader statute.

have held it immaterial that the person may desire and intend to retain his citizenship in this country. *Mackenzie* v. *Hare,* 239 U. S. 299, was such a ruling. The loss of citizenship was simply the result of the citizen's voluntary act in marrying the alien. As the Court said, 239 U. S. at 312, her act was "as voluntary and distinctive as expatriation and its consequence must be considered as elected." [16]

In *Savorgnan* v. *United States,* 338 U. S. 491, the Court expressly ruled that the subjective intent of the citizen not to lose United States nationality could not overcome the effect of her voluntary action in acquiring Italian nationality. It characterized the expatriating act as objective (338 U. S. at 497, 499) and declared, at p. 500:

> There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.[17]

---

[16] It is to be noted that it is of no significance that Mrs. Mackenzie may, in normal course, have acquired her husband's British citizenship. Her complaint, as here, was against *the loss of United States citizenship,* for which British citizenship clearly was no recompense, especially since she resided and desired to continue residence in California.

[17] Here, too, petitioner's effort to explain away the decision upon the ground that Mrs. Savorgnan at least had another nationality is unavailing. The essence, in *Savorgnan* as in *Mackenzie,* was the desire, irrespective of dual-nationality, to retain *United States* citizenship. See also *infra,* pp. 29–33.

And in a footnote the Court further observed (338 U. S. at 501):

> In § 401 of the Act of 1940, Congress added a number of *per se* acts of expatriation. These included, among others, entering the armed forces of a foreign state, accepting office in a foreign state to which only nationals of such state were eligible, and voting in a political election of a foreign state. Lack of intent to abandon American citizenship certainly could not offset any of these. * * *

In *Kawakita* v. *United States,* 343 U. S. 717, 721–730, the Court and both parties assumed that Kawakita would have been expatriated if he had committed one of the statutory acts of expatriation, regardless of the jury's finding that he never intended to renounce American citizenship (see p. 732). Similarly, in *Mandoli* v. *Acheson,* 344 U. S. 133, it was immaterial whether Mandoli thought he was an American or an Italian.

In the earlier lower court case of *Ex parte Griffin,* 237 Fed. 445, 453 (N. D. N. Y.), it was said: "If it be the natural and inherent right of a citizen to expatriate himself or herself, it would seem that the government should have the right to declare that the doing of acts by the citizen which are inconsistent with the discharge of his duties as such citizen to his government, accompanied by a departure from its jurisdiction, constitute expatriation—abandonment and renunciation of citizenship." See also *Revedin* v. *Acheson,* 194 F. 2d 482, 484 (C. A. 2), certiorari denied, 344 U. S. 820 ("She cannot escape [the provisions'] effect merely because she did not intend to

be bound by them or because she kept herself insulated from the significance of free and conscious acts for which she must be held responsible"). The other cases cited *supra*, pp. 19–20, have also found loss of nationality by the doing of specified acts, regardless of the subjective purpose or intent of the citizen.[18]

(*b*). In this connection, petitioners have misinterpreted decisions in which the courts have held that it was the intent of Congress that the expatriating act should be a voluntary one. *E. g., Perkins* v. *Elg*, 307 U. S. 325, 334; *Acheson* v. *Macuza*, 202 F. 2d 453, 457 (C. A. D. C.); *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1). These rulings all concern voluntariness in the performance of the specific conduct designated by Congress as an expatriating act (see the Government's brief in No. 415, this Term), and not voluntariness of expatriation in the sense of a deliberate choice to give up American nationality. There is, of course, a vital distinction between the two concepts. An act may be done voluntarily—such as the marriage in *Mackenzie* v. *Hare*, *supra*, or the acquisition of Italian nationality and residence in *Savorgnan*, *supra*, or using a foreign

[18] The Government has heretofore urged that the acts listed in Section 401 of the Nationality Act of 1940 are the exclusive means of losing American nationality. See Brief for the United States, *Kawakita* v. *United States*, No. 570, Oct. Term, 1951, at pp. 38–44, and Brief for the Respondent, *Mandoli* v. *Acheson*, No. 15, Oct. Term, 1952, at pp. 68–80, 86–88. The Court has found it unnecessary to pass upon this contention. See *Kawakita* v. *United States*, 343 U. S. 717, 730–732; *Mandoli* v. *Acheson*, 344 U. S. 133, 139. In reserving the question, the Court, we assume, contemplated that there might be other means of exercising the *right* of expatriation by an individual who *did* desire to renounce his American allegiance.

country as a means of evading wartime military service, as in this case and in No. 623, or voting in a foreign election, as in this case, or serving in a foreign army, as in No. 415, or deserting in time of war, as in No. 710—but still without subjective or personal intent to renounce United States nationality. Indeed, the individual's disregard of the damaging effect of his conduct upon the United States is likely to be accompanied by an equal disregard of, and indeed opposition to, the commensurate loss of the benefits of American citizenship. Congress has recognized that the performance of the act of expatriation must be voluntary, but it has not provided that the individual must know that he is giving up his citizenship, or that he must intend to do so.

So here, if petitioner's staying out of the country to avoid military service and his voting in a foreign country were not his voluntary acts, he would not be within Sections 401 (e) and (j). But when he has voluntarily remained out of this country for the purpose of evading military service, and has voted in the foreign state, it becomes immaterial whether or not he intended thereby to renounce his American citizenship or whether he even knew that his act would result in loss of American citizenship. It is the intentional doing of the act which results in the loss of nationality.

5. Great stress has sometimes been laid (see, *e. g.*, Pet. Br. in No. 415, pp. 46–48; *amicus* brief of Francisco Mendoza-Martinez, petitioner in No. 623, pp. 12, 20a–22a) upon a group of rulings by Chief Judge McLaughlin in the District Court for the Dis-

trict of Hawaii, voiding loss-of-nationality provisions (subsections (c), (d), and (e) of Section 401 of the Nationality Act of 1940, *infra*, p. 60), concerning United States nationals who serve in the army of another nation of which they are also nationals, accept office in such a nation, or vote in foreign political elections—on the ground that Congress can do no more than implement the citizen's own renunciation of citizenship. The Government appealed the first two of these decisions (*Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587, and *Hisao Murata* v. *Acheson*, 99 F. Supp. 591), but this Court remanded (342 U. S. 899, 900) for findings as to the circumstances under which the claimed citizens had performed their services in the Japanese army or voted in Japanese elections. Upon remand, the judge, while finding no "legal duress," made clear findings of outright compulsion. 111 F. Supp. 303, 305–306. Since these findings of coercion were entirely comparable to findings made in a large number of other Japanese-American expatriation cases in Hawaii and the federal district courts on the West Coast which the Government had not appealed, the Government sought no review of the ultimate holding in these two Hawaiian cases. Similarly, in the other cases in which Judge McLaughlin has invalidated provisions of Section 401, the Government has not appealed to this Court because (a) in each instance the record or findings revealed duress or coercion or some other infirmity of the type which has led the other district judges trying this class of Japanese-American expatriation case to hold—without invalidating the statute—that expatriation did

not occur;[19] and (b) the Ninth Circuit, which includes the District of Hawaii, has already sustained the validity of these provisions of the statute. See *Miranda* v. *Clark*, 180 F. 2d 257, 259 (C. A. 9); *Acheson* v. *Mariko Kuniyuki*, 189 F. 2d 741, 744 (C. A. 9), certiorari denied, 342 U. S. 942; *Gonzales* v. *Landon*, 215 F. 2d 955 (C. A. 9), reversed on other grounds, 350 U. S. 920; *Vidales* v. *Brownell*, 217 F. 2d 136, 138 (C. A. 9); *Nishikawa* v. *Dulles*, 235 F. 2d 135, 141 (C. A. 9), No. 415, this Term; cf. *Mendoza-Martinez* v. *Mackay*, 238 F. 2d 239 (C. A. 9), No. 623, this Term.

B. CONGRESS CAN DECLARE THAT CONDUCT SHALL RESULT IN LOSS OF NATIONALITY WHERE SUCH CONDUCT MAY LEAD TO INTERNATIONAL EMBROILMENT OR ADVERSELY AFFECT THE CARDINAL ELEMENTS OF ALLEGIANCE TO THE UNITED STATES

Congressional power to fix the conditions for loss of nationality—regardless of the citizen's subjective intent to renounce or give up his American citizenship—plainly exists, as we have just shown, but it cannot be exercised arbitrarily or unreasonably. The Due Process Clause of the Fifth Amendment would condemn such use of the power. What, then, are the considerations which must govern action by Congress in this field?

1. It has been urged, in the first place, that, at most, the loss of nationality can result only from acts which evince the actual acceptance of some other nationality, such as naturalization in a foreign state.

[19] The Government has not appealed these decisions when adequately based on duress or a comparable nonconstitutional ground.

But this is only a restatement of the argument that Congress can do no more than recognize the conscious desire of a citizen to change nationality; it makes action by Congress dependent on an individual citizen's preference of nationality, although evidenced by acts rather than a subjective declaration of intent. As stated above (*supra*, pp. 14 *ff*), we find no such limitation on the authority of Congress to exercise the power inherent in sovereignty to determine what acts shall result in the loss of nationality. And while the actual statutes which have come before the courts have, for the most part, concerned situations involving some relationship to another country, it is significant that the courts, in upholding the statutes, have spoken, not in terms of the citizen's acceptance of some other nationality, but of the sovereign national need to determine questions which affect its international relations and its citizenship.

Here, too, the basic case is *Mackenzie* v. *Hare*, 239 U. S. 299, involving a woman's loss of nationality by marriage to a foreigner. (See *supra*, pp. 14, 15, 24). It is true that marriage had had a past legal history—albeit a confused one—of relationship to citizenship,[20]

[20] This relationship was not at all a firm one at the time of the *Mackenzie* decision, in 1915. While the Nineteenth Amendment was not ratified until August 26, 1920, the emancipation of married women had progressed considerably prior to that date. In California, where the *Mackenzie* case arose, the first constitution guaranteed the right of married women to own their separate property (Cal. Constitution of 1849, Art. XI, Sec. 14; see also Cal. Constitution of 1879, Art XX, Sec. 8, and California Civil Code, Sec. 157). In 1872, a married woman in California was enabled to contract, either with her husband or with any other person (Cal. Civ. Code, Sec. 158; *Goad* v. *Moulton*, 67 Cal.

but the Court sustained Mrs. Mackenzie's expatriation, not because of that relationship, but because of the national need for harmonious and orderly international relations which supported the legislation. The Court said, at p. 316:

> [T]he legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. * * * This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. *It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies.* [Emphasis added.]

536, 8 Pac. 63 (1885); *Marlow* v. *Barlow*, 53 Cal. 456 (1879)) and to convey her separate property (Cal. Civ. Code, Sec. 162; *Marlow* v. *Barlow*, *supra*). By 1915, married women in California were solely liable for their torts (Cal. Civ. Code, Sec. 171a, added in 1913), and crimes, except for misdemeanors committed under the threat, command or coercion of their spouses (Cal. Pen. Code, Sec. 26, enacted 1872), and were allowed to vote (Constitution of 1879, Art. II, Sec. 1, Amendment of 1911). (Indeed, the *Mackenzie* case arose because Mrs. Mackenzie had been refused registration as a voter on the ground that she had lost her United States citizenship (239 U. S. at p. 306)). This Court itself noted that there had been "much relaxation" of the principle of "identity of husband and wife" (239 U. S. at p. 311). The Court's purpose in referring to those facets of identity which still remained was to point out that the legislation was "urged by conditions of national moment," which might involve "national complications" and "bring the Government into embarrassments" (239 U. S. at p. 312), and thereby to show that the statute was not arbitrary or unreasonable.

Thus, the Court considered expatriation as dependent upon its relationship to "conditions of national moment," not upon its connection with the citizen's own choice of nationality or upon his acceptance of another citizenship.

Also, the taking of an oath of allegiance to a foreign state—made an act of expatriation by Section 2 of the Citizenship Act of March 2, 1907, 34 Stat. 1228—does not always, or even usually, entail the acquisition of the nationality of the other state.[21] But it was specifically made expatriating in 1907, on the recommendation of the Citizenship Board of 1906 (see H. Doc. No. 326, 59th Cong., 2d sess., pp. 3, 23),[22] and it had often been considered by the State Department to have that effect. See III Moore, *Digest of International Law* (1906), Sec. 468, pp. 718–730.

Similarly, mere residence abroad for five years on the part of a naturalized citizen, particularly in a country not of his original allegiance, does not evidence an intent to adopt a nationality other than United States nationality. Yet the national interest opposed to prolonged stays abroad by citizens formerly bearing foreign allegiance was held to be a suffi-

[21] Most frequently, the taking of such an oath has been required in connection with service in the army, whether as a volunteer or as a conscript. See *Savorgnan* v. *United States*, 338 U. S. 491, 501, fn. 17.

[22] The Board was appointed by Secretary of State Root, pursuant to a suggestion from the House Committee on Foreign Affairs, and consisted of Solicitor James Brown Scott, the Minister to the Netherlands, and the Chief of the Passport Bureau of the State Department. The 1907 Act was largely based on its recommendations. See H. Rep. Nos. 4784, 59th Cong., 1st sess., and 6431, 59th Cong., 2d sess., p. 1.

cient basis for sustaining the power of Congress to enact the provision. *Lapides* v. *Clark*, 176 F. 2d 619, 620–621 (C. A. D. C.), certiorari denied, 338 U. S. 860 (*supra*, p. 20).

Historically, then, the statutory acts of expatriation have gone beyond those which indicate acquisition of another nationality or the deliberate choice of another allegiance over that to the United States. There is no basis for restricting the authority of Congress to that limited area.

2. But, as the foregoing discussion shows, expatriation for foreign naturalization does indicate one signal factor which Congress has properly taken into account—the possibility that "an act [of a citizen] may bring the Government into [foreign] embarrassments and, it may be, into controversies" (*Mackenzie, supra*, 239 U. S. at 316). Conduct by an American such as taking an allegiance oath to another country (Section 401 (b) of the 1940 Act), or serving in its army as its own national (Section 401 (c)), or working for its government as one of its nationals (Section 401 (d)), or the commission of an act of treason (Section 401 (h)), and even voting in a foreign political election (Section 401 (e)), may very well lead to embroilment or conflict between the foreign state and this country over the duties and obligations of the American who has performed such acts. Since the other nation has an obvious claim upon him, as does this country, the possibility of serious controversy is ever-present. As the Citizenship Board (see *supra*, p. 32) put it in 1906: "No man should be permitted deliberately to place himself in a position where his

services may be claimed by more than one government and his allegiance be due to more than one." H. Doc. No. 326, 59th Cong., 2d sess., p. 23.

3. There is other conduct not so directly entailing possible foreign conflict but which is nevertheless so inconsistent with the gravest obligations of American citizenship that Congress can provide that it leads to denationalization. For instance, and wholly apart from the international conflict involved in his conduct, a citizen who heads a foreign army seeking to overthrow the forces of the United States—who commits the gravest act of treason—thereby shows a total lack of allegiance to this country, a total subversion of his duties, obligations, and attachments as an American.

There are, of course, lesser acts which reveal a lack of allegiance to, or support of, this country, or an inappropriate preference for another nation. For instance, voluntary participation in the governmental affairs of another nation can in certain circumstances be said, even apart from the possibility of international controversy, to represent too intimate a connection with the other state and too great a diminution of the citizen's primary obligation to the United States.

The only generalization we would offer on this score is that the act of expatriation must have such a close relation to the cardinal elements of United States nationality and allegiance that it is reasonable, with due consideration for the "cherished status" of American citizenship (*Knauer* v. *United States*, 328 U. S. 654, 658), for Congress to impose loss of nationality as a result of the commission of the act.

The instant petitioner himself suggests (Pet. Br. 13) the somewhat different test of whether the "nation's independence and security *might* be jeopardized" (emphasis added) by permitting an American to do the designated act and still remain a citizen of this country. Other general criteria can be developed. But whatever the standard, Congress has the basic responsibility of evaluating the pertinent factors and considerations; judicial review is necessarily confined to narrow limits. And the delineation of the outer boundaries must be left, in this field as in so many others, for the future as it unfolds. Since the alarm expressed by petitioners (and those who support their position) is not truly directed against the statute before the Court but rather against hypothetical provisions which have not even attained the level of responsible suggestions, there is no present need to wrestle with the asser d potential dangers which concern petitioners.

4. In his attack on our position that Congress has the power to enact reasonable expatriation legislation, the present petitioner refers to the injustices and difficulties of "statelessness" (*e. g.*, Pet. Br. 14).[23] We may point out, in the first place, that the petitioners in Nos. 415, 572, and 623, each appear to be dual-nationals, and their loss of United States citizenship will leave them with their other nationality (Japanese or Mexican) which they each have claimed at one time or another. There is no reason to believe that the

[23] See also the petitioner's brief, and the *amicus curiae* brief of the American Jewish Congress, in No. 710.

present petitioner (in No. 572), who lived in Mexico for over 30 years and whose wife and seven children continue to live there, will be unable to live in Mexico.

Secondly, it should be noted that certain of the acts of expatriation defined in Section 401 of the 1940 Act—obtaining foreign naturalization (subsection (a)), entering a foreign army (subsection (c)),[24] and taking a foreign governmental post (subsection(d))—expressly depend upon the existence of dual-nationality, and therefore cannot involve statelessness. On the other hand, certain provisions of Section 401—formally renouncing American nationality abroad (subsection (f)), and formally renouncing citizenship while in the United States (subsection (i))—plainly contemplate a deliberate, voluntary, choice by the individual of statelessness.[25]

Statelessness is, indeed, an international problem in the modern day. But it is a problem to be solved by the political branches of the Government, if they can and desire to do so; it is not for the courts to cure by invalidating Congressional legislation which could lead in some circumstances to statelessness. The undesirability of that status has not attained the level of a constitutional principle to be imposed on Congress by this Court.

5. It is also well to point out that there is not really involved in these cases any question as to the

[24] This is the provision involved in the *Nishikawa* case, No. 415.

[25] Cf. the well-known instance of Garry Davis.

banishment or deportation of expatriated native-born persons who are living in the United States at the time of their loss of nationality. Congress has not attempted expressly to deport such persons, and the present immigration laws would not normally cover them unless they left the country and then sought to reenter. The validity of legislation requiring the deportation of such denationalized native-born individuals is therefore not before the Court, and need not now be taken into account. There may well be problems inherent in such deportation legislation which differ from, and go beyond, those involved in the constitutionality of the various loss-of-nationality provisions of Section 401. Those problems should be left to the proper case, if and when it arises.

To the extent that the present petitioners may be deportable if they have lost their American citizenship, their deportability arises, under the general immigration laws, because they became expatriated while outside the United States and their last entries were therefore as aliens and not as citizens.[26] If these entries were improper under the general law, the petitioners are subject to deportation (or to exclusion if they are seeking entry and cannot qualify for entry as an alien). But they are not being banished from their homes under a deportation law directed against persons expatriated while in this country.

---

[26] Perez (in No. 572) and Mendoza-Martinez (in No. 623) have lived most of their lives in a foreign country, and have been held to have become expatriated while in Mexico. Nishikawa (in No. 415) went to Japan in 1939, and, in the view of the courts below, lost his nationality while abroad.

II

CONGRESS HAS THE CONSTITUTIONAL POWER TO PROVIDE THAT UNITED STATES NATIONALITY IS LOST BY ONE WHO REMAINS OUTSIDE THE JURISDICTION OF THE UNITED STATES IN TIME OF WAR TO EVADE MILITARY SERVICE, BY ONE WHO VOTES IN A FOREIGN STATE, BY A DUAL-NATIONAL WHO SERVES IN THE ARMED FORCES OF HIS OTHER NATION, AND BY A SERVICEMAN WHO IS CONVICTED OF DESERTION IN WARTIME

In Point I, *supra*, pp. 13–37, we have discussed, in general terms, the power of Congress to provide for loss of nationality, and the criteria by which its action is to be tested. In this Point, we discuss, in particular, each of the four subsections of Section 401 of the 1940 Act which is under attack in the present set of cases, and show that each is a reasonable requirement which Congress could adopt in its discretion.[27]

A. SECTION 401 (c)—SERVICE BY A DUAL-NATIONAL IN THE FORCES OF HIS OTHER STATE[28]

On this subsection, little need be added to the general argument in Point I, *supra*, pp. 29–37. There is an obvious possibility of conflict between the two nations over the military service of the dual-national. The classic problem with respect to expatriation in our history has been the call of an American to military duty by the country of his former or other nationality (*supra*, p. 22); we have long struggled to free our nationals from such demands. It cannot be invalid for Congress to do its share to maintain this principle

[27] We set out in Appendix B, *infra*, pp. 62–63, the Immigration and Naturalization Service figures for expatriations in recent years.

[28] This is the provision involved in the *Nishikawa* case, No. 415.

by providing that an American who chooses to serve shall thereafter have the single nationality of his other country.

In addition, Nishikawa's own case history[29] shows that an American who serves in the foreign army of his other nationality may be called upon to fight against this country and thus to traduce the most essential obligation of the citizen.[30]

B. SECTION 401 (e)—VOTING IN A FOREIGN POLITICAL ELECTION[31]

Since voting is one of the highest duties of a citizen, it normally connotes an intimate participation in the public affairs of the foreign country and a strong attachment to that state. Indeed, in most countries only nationals (or those who have indicated their intention to become nationals) can vote. The connection with foreign political processes and with foreign obligations is very close; a form of political allegiance to the other state is shown by the very act of voting. Congress could therefore reasonably declare that Americans who voted abroad should cease to be Americans.[32] Many may differ with the wisdom of

---

[29] See the Government's brief in No. 415, at pp. 5–6.

[30] For cases upholding and applying Section 401 (c), see *supra*, p. 20.

[31] This provision is involved in the present case, No. 572.

[32] The Cabinet Committee which proposed the Nationality Act of 1940 (see *supra*, pp. 17–18) said of its suggestion of expatriation for voting in a foreign political election (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H. R. 6127, at p. 491):

"* * * Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United

that ultimate judgment—particularly as it leads in some cases to harsh results (see Pet. Br. herein, p. 21)[33]—but the choice was for Congress to make, and it did not exceed its authority in choosing.[34]

C. SUBSECTION (j)—REMAINING ABROAD TO EVADE MILITARY SERVICE[35]

By the standards discussed in Point I, a statute prescribing loss of nationality for one who remains out of the country to avoid military service is a reasonable exercise of the power of Congress. The problem of draft evaders who remain out of the country in a period of war or national emergency in order to avoid a fundamental obligation of citizen-

---

States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other."

[33] Mrs. Shipley's speech (which this petitioner quotes (Pet. Br. 21)), suggesting that United States citizens voting in foreign countries may have done so to help this country or to obtain food rations, concerns, of course, the wisdom of the outright rule adopted by Congress, not its validity. We may also note that Mrs. Shipley's remarks fail to take account of the many lower court decisions which have held foreign voting not to be expatriating because done under duress—to obtain ration cards, or for some other overriding reason. As for voting in supposed assistance of American policies, the benefit in such voting is not to be judged by the citizen's own estimate of the best policy; Congress has enacted the firm policy that such participation in political affairs abroad should not be permitted. See fn. 32, *supra*.

[34] For cases upholding and applying Section 401 (e), see *supra*, pp. 19–20.

[35] This provision is involved in the present case, No. 572, and in *Mendoza-Martinez*, No. 623. In the latter case, it is the only act of expatriation charged.

ship—service in defense of the nation—is manifestly a serious one. It is rendered peculiarly grave by the fact that, in remaining out of the country, such persons put themselves out of the reach of ordinary criminal sanctions which apply to draft evaders within the country. Moreover, these men present a problem in international relations since, so far as other countries are concerned, they remain United States citizens, while, so far as this nation is concerned, they have rejected the obligations of citizenship.

1. Ever since the Civil War, the United States has felt the need for legislation of this type. This was true in 1865, even before the "right" of the citizen consciously to renounce nationality was spelled out in the Act of 1868.[36] Congress, by the Act of March 3, 1865, Section 21 (13 Stat. 490), provided for forfeiture of the rights of citizenship of deserters and enrolled draftees who departed from their district or from the United States with intent to avoid draft into the armed forces.[37] The statute operated even if the

[36] As noted above (p. 23, fn. 15), the Act of July 27, 1868, 15 Stat. 223, Rev. Stat. 1999, gave legislative recognition to the "right of expatriation" as a "natural and inherent right of all people", but did not define what constituted expatriation. It is interesting, though perhaps not too significant, that the 14th Amendment was declared by Congress to be a part of the Constitution on July 21, 1868, and officially promulgated by the Secretary of State on July 28, 1868, one day after enactment of the expatriation act.

[37] " * * *[A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and

evader did not leave the jurisdiction of the United States.

Though this enactment refers to "rights of citizenship," rather than to citizenship itself, it has been treated as a loss-of-citizenship or loss-of-nationality statute. The Act specifically decrees that *alien* deserters and draft-evaders shall forfeit "their rights to become citizens" (see fn. 37, *supra,* pp. 41–42). The Revised Statutes included it under the title of "Citizenship" (Title XXV) (Rev. Stat. 1996, 1998) along with the 1868 expatriation statute (Rev. Stat. 1999) (fn. 36, *supra,* p. 41), and other provisions dealing with nationality.[38]

Administratively, the 1865 Act has likewise been

---

forfeited their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section. * * *."

[38] These provisions show that Congress has often used the terms "rights of citizenship" and "citizenship" interchangeably. For instance, Rev. Stat. 1993, providing for citizenship of children born abroad of fathers who were Americans at the time of the child's birth goes on to say: "but the *rights of citizenship* shall not descend to children whose fathers never resided in the United States" (emphasis added). See *Weedin* v. *Chin Bow*, 274 U. S. 657. And the Expatriation Act of 1868 (*supra*, p. 41) itself says that "this Government has freely received emigrants from all nations, and invested them with the *rights of citizenship* * * *" (emphasis added). See also *Shelley* v. *United States*, 120 F. 2d 734, 735 (C. A. D. C.) (Act of July 2, 1940, 54 Stat. 715).

recognized as a loss-of-nationality statute. The Citizenship Board of 1906 (*supra*, p. 32) considered it a statutory provision for loss of citizenship. See H. Doc. No. 326, 59th Cong., 2d sess., p. 159. The State Department so construed it. See the remarks of Assistant Legal Adviser Flournoy at the hearings on the proposed Nationality Act of 1940 (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., *supra*, at pp. 38, 132–133; cf. 186–187) and III Hackworth, *Digest of International Law* (1942), pp. 276–279. The Cabinet Committee which proposed the 1940 Nationality Act drew upon the 1865 statute as the parent of its suggestion as to expatriation for desertion (Hearings, *supra*, pp. 491–492). And when Attorney General Biddle proposed, in 1944, that Section 401 (j) be added to the 1940 Act, he mentioned that the comparable 1865 Act existed and was operative during World War I. See H. Rep. No. 1229, 78th Cong., 2d sess. (quoted, in part, *infra*, pp. 54–55). The few courts which have dealt with the 1865 Act seem also to have considered it as imposing loss of nationality, rather than some lesser disability. See *infra*, pp. 43–44.

2. The constitutionality of this 1865 Act was squarely and extensively considered and its validity upheld in *Gotcheus* v. *Matheson*, 58 Barb. 152, 155–160 (reversed on other grounds, 61 N. Y. 420), the court relying upon the constitutional powers of Congress with respect to the armed forces (Const. Art. 1, section 8, subd. 11 and 13). The validity of the Act (as well as its effectiveness as an expatriation statute) has been assumed in utterances of this Court, of other

courts, of Attorneys General, and of other administrative officials, dealing with questions under this legislation. See III Hackworth, *Digest of International Law* (1942), pp. 276–279; *Kurtz* v. *Moffitt*, 115 U. S. 487, 501 (in which the effectiveness of the loss of citizenship of deserters was considered dependent, apparently, only upon a court-martial's finding of the fact of desertion); *In re Carver*, 142 Fed. 623, 624 (C. C. D. Me.); *United States* v. *Snow*, 27 Fed. Cas. (No. 16,350) 1255, 1256, (E. D. Tenn.); *Cavender* v. *United States*, 8 C. Cls. 281, 282; *Citizenship of Grover Cleveland Bergdoll*, 39 Op. A. G. 303; *State* v. *Symonds*, 57 Me. 148, 150; *Holt* v. *Holt*, 59 Me. 464, 465–466; *Severance* v. *Healey*, 50 N. H. 448, 451; *McCafferty* v. *Guyer*, 59 Pa. 109, 110, 113, 119, 123; *Huber* v. *Reily*, 53 Pa. 112, 119.

3. The 1865 statute was amended in 1912 to make it inapplicable in times of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[39] Thus, the statute involved in the present case (Section 401 (j)) had behind it the support of many years of history. When it was enacted in 1944, at the suggestion of Attorney General Biddle, conditions incident to World War II revealed a special need to re-

[39] Section 401 (g) of the 1940 Act provided for loss of nationality by those deserting the armed forces in time of war (54 Stat. 1169). See *infra*, pp. 49–50, 60. This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters and with draft evaders. Provision with respect to draft evaders was resumed in 1944, see *infra*.

instate the provision with respect to draft-evaders."[40] H. Rep. No. 1229, 78th Cong., 2d sess., which accompanied the bill which became Section 401 (j), spells out the circumstances, at pp. 1–2.

> It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

And Attorney General Biddle's letter to the Congress stated (H. Rep. No. 1229, *supra*, at pp. 2–3):

> Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.

(See also *infra*, pp. 53–55).

The bill was passed unanimously by the House (90 Cong. Rec. 3256), favorably and unanimously reported by the Senate Committee (S. Rep. No. 1075,

---

[40] Petitioner apparently assumes (Pet. Br. 35) that comparable language as to "reinstatement" in the Government's brief in *Gonzales* v. *Landon* (O. T. 1955, No. 111, pp. 43, 61) indicated that the 1865 Act was identical with that of the instant Act. As pointed out, *inter alia*, in the Government's brief, pp. 58–59, the 1865 Act did not require leaving the jurisdiction. See also fn. 41, p. 46, *infra*.

78th Cong., 2d sess.) and then passed unanimously by the Senate (90 Cong. Rec. 7628–7629). The House then accepted a technical Senate amendment (90 Cong. Rec. 7725–7726), and the bill became law on September 27, 1944.[41]

4. Congress cannot be charged with unreasonable or arbitrary action in correcting the mistaken "expectation" of these draft-evaders "of returning to the United States to resume residence after the war" (*supra*, p. 45). When the nation is drafting servicemen in time of war or emergency, its need for military manpower is great and draft-evasion means a loss of needed men in a critical time. Draft-evasion also means inequality of service and inequality of sacrifice. And when the evader flees or remains abroad, he likewise evades the criminal sanctions which might otherwise prod him into performing his duty. In addition, there are possible international complications by reason of his residence abroad and refusal to fulfill his obligations to the United States; he may call upon the other country (of which he may also be a national) for aid, or he may resist compliance on the basis of its laws.[42] The domestic and international problems caused by such draft-evasion are plain.

---

[41] H. Rep. No. 1229, *supra*, p. 2, makes it clear that—unlike the 1865 Act (*supra*, pp. 41–42, 44)—no court conviction would be necessary for expatriation under Section 401 (j). First, there would be an administrative decision and, then, the individual would have access to the courts under the declaratory judgment procedure or, if necessary, by way of habeas corpus.

[42] For instance, in the *Gonzales* case, at the last Term, No. 111, the petitioner, a national of both Mexico and the United States, claimed that he was exempt from service here under an executive agreement of this country with Mexico.

On the other hand, readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of United States citizenship, subject only to the most narrow exception of conscientious objection. The country's demand upon the citizen-soldier has been deemed the highest call to duty. This Court has characterized it as the "supreme and noble" duty (*Selective Draft Law Cases,* 245 U. S. 366, 390), and has recognized the primacy of military service, *when the citizen is called upon by Congress to perform it,* as *the* obligation of citizenship. Cf. *United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605; *United States* v. *Bland,* 283 U. S. 636; *In re Summers,* 325 U. S. 561, 572; *Girouard* v. *United States,* 328 U. S. 61, 64; *Falbo* v. *United States,* 320 U. S. 549; *Lichter* v. *United States;* 334 U. S. 742, 756–757.

When the draft-evader combines lurking abroad with his willful repudiation of this prime obligation, he cannot, with any regard to realities, challenge as arbitrary Congress' designation of such conduct as a dissolution of the ties of allegiance between him and the nation. For he has rejected his highest duty of citizenship and has also kept himself beyond the reach of the United States criminal sanctions designed to compel him to fulfill that duty. He is repudiating not only his military obligation but the entire governmental mechanism of the United States to which a citizen must submit; by putting himself beyond the reach of American sanctions and control, he is deliberately denying all the obligations of the

citizen and rejecting all authority of the United States over him.

He is also, in effect, choosing whatever protection he may obtain from another country, as against the protection of the United States and its correlative obligations. Petitioner may well enumerate *now* every possible theoretical hardship in having to live in another country, but the fact remains that he found neither such hardship nor, indeed, any but a preference for that dissociation from the United States when it was to his advantage so to dissociate himself. Obviously, there is great attractiveness in such a theoretical citizenship of which even the gravest obligations can be ignored, by flight or residence abroad, without risk to that citizenship. Petitioner's action is at least as much the outward manifestation of a preference for another country as the marriage to an alien (within the United States) involved in *Mackenzie* v. *Hare*, 239 U. S. 299, or the mere five-year foreign residence involved in *Lapides* v. *Clark*, 176 F. 2d 619 (C. A. D. C.), certiorari denied, 338 U. S. 860. It is certainly a more decided repudiation of allegiance to this nation than those two acts of expatriation.

In sum, one who intentionally chooses foreign residence in place of the military burden of citizenship, in time of war or emergency, is not in a position to charge that Congress has acted unreasonably in drawing conclusions from his choice. It was probably not by chance that the first federal expatriation statute was the 1865 Act dealing with deserters and draft-evaders. Repudiation of the citizen's duty to help

preserve the nation in time of war has for almost a century been regarded as cause for severing the cords of allegiance. This assumption is not invalid. Petitioner's unilateral concept of citizenship—all benefits and no obligations—is not imbedded either in our history or in the Constitution.[43]

D. SUBSECTION (g)—DESERTING THE ARMED FORCES [44]

For the most part, the history of Section 401 (g) is bound up with Section 401 (j), which we have just discussed (*supra*, pp. 40–49). Both provisions stem from the same 1865 Act, and they had the same history until 1940. The 1940 Act continued the desertion provision but omitted the draft-evasion portion (*supra*, p. 44).

The reasons which sustain Section 401 (j) also apply to the cognate Section 401 (g). Desertion in wartime, like draft-evasion, is a repudiation of the highest obligation of citizenship, and involves kindred considerations. Subsection (g) does differ from subsection (j) in that it omits the requirement of flight from this country or foreign residence; but the absence of this factor does not swing the balance against constitutionality. The special nature of the obligation which the citizen has repudiated combines with history to show that the taking away of nationality under the particular condition specified in Section 401 (g) involves a matter of "national moment" (see *Mackenzie*

[43] For the lower court cases on Section 401 (j), see *supra*, p. 19. See, also, Sharon, *Loss of Citizenship by Draft Dodgers*, 5 Monthly Review of the Immigration and Naturalization Service 97 (Feb. 1948).

[44] This provision is involved in the *Trop* case, No. 710.

v. *Hare,* 239 U. S. 299, 312), and is therefore within the constitutional power of Congress.

III

THE PROVISIONS OF THE EXPATRIATION STATUTE DO NOT INVOLVE CRIMINAL PROSECUTION OR PUNISHMENT

The present petitioner, as well as those in Nos. 415, 623, and 710, seeks to analogize the provisions of Section 401 to criminal prosecution, and thereby to assert unconstitutionality by reason of the failure of Congress to prescribe the full procedural requirements of criminal prosecution, or because expatriation is said to be a cruel and unusual punishment. This petitioner restricts his argument to Section 401 (j) (draft evasion) (see Pet. Br. herein, pp. 31–45),[45] but petitioner in No. 415 seems to suggest the same argument as to Section 401 (c) (service in the foreign army) (see Pet. Br. in No. 415, p. 42), and petitioner in No. 710 applies it to Section 401 (g) (desertion).[46] We submit that the point is not sound as applied to any of the four provisions involved in these cases.

A. In the first place, it is plain that these expatriation provisions are not inherently or exclusively penal in their nature; quite apart from any deterrent or punitive aspect of the statute, Congress *could* have believed that Americans who performed these acts

---

[45] He does *not* make the argument as to Section 401 (e) (voting), which is also involved in his case.

[46] The same general contention is made in Comment, 64 Yale L. J. 1164, and in Hurst, *Can Congress Take Away Citizenship?* 29 Rocky Mtn. L. Rev. 62 (reprinted in the appendix to the brief of *amicus* Mendoza-Martinez, petitioner in No. 623).

were no longer citizens in reality, or were unworthy of continued citizenship, or that continued American citizenship would entail difficulties with other countries. Certainly, the Court will not characterize these provisions as penal or punitive unless it is convinced, at the very least, that the dominant, if not the exclusive, concern of Congress was with punishment. But that is clearly not the case with Section 401 of the Nationality Act of 1940.

On the face of the enactment, the Congress made a distinction between penal provisions and its designation of certain acts as involving loss of nationality. The chapter entitled "LOSS OF NATIONALITY" followed, and was separated by only a single paragraph, from a whole section entitled "PENAL PROVISIONS" (54 Stat. 1163). See *Hel[illegible]ring* v. *Mitchell*, 303 U. S. 391, 404, with respect to the significance of the physical separation of non-penal provisions of a statute from the penal sanctions. Moreover, Section 401 is not couched in criminal or penal language, but rather in the normal terms used for describing non-penal consequences of specified conduct. And most of the acts of expatriation designated in the section do not involve conduct which is made criminal, either by the general federal criminal code or by other federal statutes.

The legislative history of Section 401 likewise shows that punishment was not dominant in the minds of Congress. In the Cabinet Committee report on the proposed bill (*supra*, pp. 17–18), there was clearly noted the distinction between penal provisions and

those under which loss of nationality was to "result from" the existence of stated facts. The Cabinet members said: "None of the various provisions in the [proposed Nationality] Code concerning loss of American nationality * * * is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts or inaction, show that their real attachment is to the foreign country and not to the United States" (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H. R. 6127, at p. 409).[47] The Cabinet Committee's remarks in connection with its specific proposals on expatriation also indicated that it was concerned, not with punishment, but with the undesirable consequences of allowing Americans who committed these acts to continue as citizens of this country. See, *e. g.*, the comments as to foreign voting quoted in fn. 32, *supra*, pp. 39–40, and see the other comments set out in the Hearings, supra, at pp. 489 *ff*. There is nothing in the debates on these provisions which contradicts this non-penal emphasis on loss of nationality. See 86 Cong. Rec. 11942–11949 and the phrasing of S. Rep. No. 2150, 76th Cong., 3d sess., reprinted at 86 Cong. Rec. 12430–12431.

Specifically with respect to Section 401 (g) (the desertion provision), the Cabinet Committee, although recognizing that the precursor 1865 Act was (p. 492)

[47] This statement (along with others of the Cabinet Committee's comments) was referred to by Chairman Dickstein in the House discussions of the bill. 86 Cong. Rec. 11945–6.

"distinctly penal in character,"[48] referred to subsection (g) as "technically" "not a penal law," and proposed that the new expatriation provision should be adopted in addition to the penal sanctions for desertion.

Even more clearly, in 1944, at the time of the proposing of the additional provision with respect to a foreign stay for the purpose of draft-evasion (Section 401 (j)), the letter of Attorney General Biddle treated the contemplated provision for what it was—a designation of a loss of nationality rather than a punitive device. The letter, quoted in both the Senate and House committee reports, stated in pertinent part (H. Rep. No. 1229, pp. 2–3, S. Rep. No. 1075, 78th Cong., 2d sess.):

> Under existing law a national of the United States, whether by birth or by naturalization, becomes expatriated by operation of law if he (1) obtains naturalization in a foreign state; (2) takes an oath of allegiance to a foreign country; (3) serves in the armed forces of a foreign state if he thereby acquires the nationality of such foreign state; (4) accepts employment under a foreign state for which only

[48] Language concerning punishment in some of the decisions under the 1865 legislation rested upon the "avowed" language of that legislation, not found here, providing that the loss of nationality should be in addition to "the *other* lawful penalties" (emphasis added). *Huber* v. *Reily*, 53 Pa. 112, 114, 116, 118 (even in that case, two of the five judges denied that a penalty was involved; see *McCafferty* v. *Guyer*, 59 Pa. 109, 113–114, 124–128, Agnew, J.); *State* v. *Symonds*, 57 Me. 148, 150–152, and *Kurtz* v. *Moffitt*, 115 U. S. 487, 501, both of which merely followed *Huber*, *supra*, in dicta (*Symonds* involving sufficiency of an indictment, and *Kurtz* the propriety of an arrest by State officers for federal desertion).

nationals of such state are eligible; (5) votes in a political election in a foreign state or participates in an election or plebiscite to determine the sovereignty over foreign territory; (6) makes a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state; (7) deserts from the armed forces of the United States in time of war and is convicted thereof by a court martial; or (8) is convicted of treason (U. S. C., title 8, sec. 801). * * *

The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to *prosecution* for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that *in addition* they should lose their United States citizenship. *Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.*

* * * Any person who may be deemed to have become expatriated by operation of the foregoing provision, would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940.

Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to

> avoid any draft into the military or naval service (37 Stat. 356). * * * [Emphasis added.]

The distinction between the loss of nationality and "prosecution" or punishment is manifest in this proposal. The Attorney General was suggesting that draft-evaders who left the country (or remained abroad) for that purpose are not "worthy" of retaining citizenship—they have committed an act which is inconsistent with the highest obligation of citizenship and which shows that they no longer should be classed as citizens. These considered indications of purpose are not overborne by the occasional lapses, in floor discussion, into informal and less accurate language as to "penalties" or "punishment." In appraising the action of Congress for constitutional purposes, the looseness of common parlance should not be allowed to countervail the essential purpose and the true nature of what has been done.

2. Needless to say, punishment is not involved merely because a consequence ensues which is financially, emotionally, or otherwise objectionable or harmful to the person affected, and which may incidentally add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the same conduct. The law knows many such disabilities or non-penal sanctions. See *e. g.*, *Helvering* v. *Mitchell,* 303 U. S. 391, 399–401; *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 554–555; *Rex Trailer Co.* v. *United States,* 350 U. S. 148.[49] See also,

[49] These three cases involve, or refer to, the following non-penal sanctions:—(a) disbarment; (b) deportation of aliens;

e. g., 18 U. S. C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387. "The penal and remedial provisions are, therefore, distinct and cannot be confounded" (*O'Sullivan* v. *Felix*, 233 U. S. 318, 324). Civil regulations based on past conduct, even though the regulation is harmful to the individual, are not invalid, or transformed into punitive sanctions, where they represent a *bona fide* exercise of regulatory power to accomplish a non-penal purpose, and are not designed to inflict punishment. Disbarment is a prime example. Cf. *Sacher* v. *Association of the Bar*, 347 U. S. 388. Another instance is furnished by *Hawker* v. *New York*, 170 U. S. 189, which upheld a state law preventing a doctor from practicing medicine, because of a criminal conviction occurring years before the statute was passed. See, also, *Barsky* v. *Board of Regents*, 347 U. S. 442. *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, made the same general ruling as to the refusal of public employment for prior subversive activity. See also *Adler* v. *Board of Education*, 342 U. S. 485; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *American Communications Assn.* v. *Douds*, 339 U. S. 382. In short, there are many instances in which non-penal disabilities, disqualifications, or sanctions follow upon conduct which may also, in whole or in part, be criminal.

This Court's decisions with respect to aliens in-

(c) denial or revocation of a license to practice a profession, trade, etc.; (d) forfeiture of goods; (e) additional tax, customs, etc., penalties and "additions" to taxes or duties; and (f) statutory sums for liquidated damages for fraud.

volve, of course, considerations not applicable to citizens, but the holdings that deportation is not punishment (*e. g., Mahler* v. *Eby,* 264 U. S. 32, 39; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 594–595; *Galvan* v. *Press,* 347 U. S. 522, 531; *Marcello* v. *Bonds,* 349 U. S. 302, 314) well illustrate the principle that severe consequences of, or disabilities imposed on, specified conduct do not *per se* constitute punishment. In the case of aliens, the sanction of deportation is imposed because Congress is "seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of security" (*Mahler* v. *Eby, supra,* 264 U. S. at 39). In the present case, the disability of loss-of-nationality is imposed because Congress has determined that persons like these petitioners can no longer accurately be called American citizens. In both classes of cases—deportation and denationalization—the determination may result in serious hardship. But the deportation cases show that the severity of the resulting consequences is not indicative of punishment where those consequences have a relationship to a purpose independent of punishment, as is the case here in the aim to delineate those who shall no longer be treated as citizens of the United States. See, also, *Rex Trailer Company* v. *United States,* 350 U. S. 148, 150–151 (in which fixed amounts of $2,000 on every count of a fraud recovery proceeding by the Government were held to be liquidated damages and not

fines); *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 549; and the cases cited *supra*, pp. 55–57.[50]

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY, III,
Assistant Attorney General.

OSCAR H. DAVIS,
Assistant to the Solicitor General.

J. F. BISHOP,
Attorney.

APRIL 1957.

---

[50] Even if it were to be assumed that the expatriation provisions constitute criminal punishment, the further conclusions drawn by this petitioner and the petitioners in Nos. 415, 623, and 710, would not follow. Thus, the complaint of petitioner in No. 623, before the Court of Appeals, that his draft-evasion was subjected to double jeopardy (*Mendoza-Martinez* v. *Mackey*, 238 F. 2d 239 (C. A. 9), Appellant's Brief, pp. 22–24) overlooks the fact that the application of Section 401 (j) requires a different set of actions by the individual than in the case of simple draft-evasion (54 Stat. 894, 60 Stat. 341; 50 U. S. C. (1946 ed.) 311, App.). Here, there is a further and different factor—the stay in a foreign country—and there has been no prior jeopardy with respect to an offense involving that element. Similarly, the assumption that cruel and unusual punishment is involved in denationalization is contrary to the rationale of the holdings of this Court in *Wilkerson* v. *Utah*, 99 U. S. 130, 135, and *Francis* v. *Resweber*, 329 U. S. 459, 463. Cf. *Weems* v. *United States*, 217 U. S. 349. Moreover, the present petitioner apparently experienced no difficulty in remaining in Mexico and raising a family so long as it suited his purpose of evading military service.

APPENDIX A

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677) and September 27, 1944 (58 Stat. 746), 8 U. S. C. (1946 ed.) 501, *et seq.*, provided in pertinent part:

> SEC. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however*, That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Provided further*, That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of [t]his Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has selected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to [January 20, 1944], shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

APPENDIX B

IMMIGRATION AND NATURALIZATION SERVICE STATISTICS ON EXPATRIATION [1]

1. In his report to the Attorney General for the fiscal year ended June 30, 1956,[2] the Commissioner of Immigration and Naturalization has given the following statistics as to persons expatriated during the years ended June 30, 1951 to June 30, 1956:

Grounds	1951	1952	1953	1954	1955	1956
Total number	4,443	3,265	8,350	6,938	4,202	4,987
Voting in a foreign political election or plebiscite	1,401	1,186	2,651	2,222	1,237	1,436
Residence in a foreign state	1,084	711	2,657	1,557	1,093	1,775
Naturalization in a foreign state	836	622	1,677	1,544	841	829
Entering or serving in the armed forces of a foreign state	565	370	700	696	269	356
Renunciation of nationality	228	136	398	425	331	167
Taking an oath of allegiance in a foreign state	147	123	152	220	233	237
Departing from or remaining away from the U. S. to avoid training and service in land or naval forces	69	59	45	134	139	69
Accepting or performing duties under a foreign state	73	56	67	134	84	112
Other grounds	40	2	3	6	5	5

[1] These statistics include, of course, only those expatriations known to the Immigration and Naturalization Service (including information received from the Department of State).

[2] The Attorney General's Report for 1956 is now being printed.

2. The Annual Reports of the Commissioner of Immigration and Naturalization for the years ended June 30, 1949, and June 30, 1950, contain the following comparable figures:

Grounds	1949	1950
Total	8,575	5,792
Voting in a foreign political election or plebiscite	4,515	1,693
Residence in a foreign state	694	1,424
Naturalization in a foreign state	754	1,096
Entering or serving in the armed forces of a foreign state	1,459	721
Renunciation of nationality	356	149
Taking an oath of allegiance in a foreign state	430	369
Departing from or remaining away from the U. S. to avoid training and service in land or naval forces	259	109
Accepting or performing duties under a foreign state	99	163
Desertion from the armed forces in wartime	4	4
Other grounds	5	64

3. Expatriation figures for the years prior to 1949 are less accurate, because of the dislocation occasioned by World War II. The total figure of expatriations given by the Immigration and Naturalization Service for the year ended June 30, 1948, is 6,779 and for the year ended June 30, 1947, is 6,758.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U
FILED
APR 26 1957
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 44

CLEMENTE MARTINEZ PEREZ,
Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHARLES A. HORSKY,
701 Union Trust Building,
Washington 5, D. C.,

FRED OKRAND,
A. L. WIRIN,
YALE KAMISAR,
Counsel for Petitioner.

JACK WASSERMAN,
Ass'n of Immigration and Nationality Lawyers,

SALVATORE C. J. FUSCO,
Of Counsel.

INDEX

	Page
I. The Basic Issue	1
II. The "Expatriating" Acts Here Involved	6

Authorities

Cases:

Huber v. *Reily*, 53 Pa. St. 112 (1866)	7
Knauer v. *United States*, 328 U.S. 654	2
Kurtz v. *Moffitt*, 115 U.S. 487	4, 7
Mackenzie v. *Hare*, 239 U.S. 299	4, 5
Perkins v. *Elg*, 307 U.S. 325	3
Savorgnan v. *United States*, 338 U.S. 491	4
Schneiderman v. *United States*, 320 U.S. 118	2
United States v. *Wong Kim Ark*, 169 U.S. 649	4

Constitution of the United States:

Art. I, § 8	2
Fifth Amendment	6

Statutes:

Act of March 3, 1865, c.79, 13 Stat. 490	3, 7
Act of July 27, 1868, c. 249, 15 Stat. 223	3
Act of September 22, 1922, c. 411, 42 Stat. 1022	5
Act of August 7, 1946, c.769, 60 Stat. 865	9
Act of August 16, 1951, c. 321, 65 Stat. 191	9
Act of June 27, 1952, c. 477, 66 Stat. 267	2
Act of July 20, 1954, c. 553, 68 Stat. 495	9
Nationality Act of 1940, c. 876, 54 Stat. 1137, as amended, 58 Stat. 4 (1944), 58 Stat. 677 (1944):	
§ 401(a)	5
§ 401(b)	5
§ 401(e)	5, 6, 7, 9
§ 401(j)	6

Legislative Materials:

	Page
H. Doc. No. 326, 59th Cong., 1st Sess.	6
H. Rep. 216, 74th Cong., 1st Sess.	9
H. Rep. 1469, 81st Cong., 2d Sess.	9
H.R. 5799, 74th Cong.	8, 9

Miscellaneous:

Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25 (1950) 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ,

Petitioner,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The brief filed by the Government in this case is written to be applicable in each of the several expatriation cases now pending in this Court. No doubt this avoids some duplication, but the consolidation of arguments in cases which involve different facts and different considerations inevitably blurs the issues in each individual case. A brief reply, we hope, will aid in clarifying the issues in *this* case.

I

The Basic Issue

The brief filed by the Government unfortunately directs its principal attention to disproving a position which peti-

tioner does not assert. Petitioner does *not* urge, as the Government brief would have it (p. 13), that Congress "can do no more in this area [of expatriation] than implement or aid the citizen's own desire or intention to give up citizenship", or "that no American can be expatriated unless he desires or intends to lose his nationality." The extended effort of the Government to disprove those statements is wholly beside the point.

What we do contend, stated simply, is this: Congress may not provide for loss of native-born American citizenship[1] except where the citizen has acquired, by some voluntary act, a new nationality or allegiance. We can add, although we believe the issue is not raised by this case,[2] that

---

[1] Since petitioner is a native-born citizen, there is no need here to explore the nature and extent of Congressional power to take away a citizenship conferred by naturalization. This Court has sharply divided on many issues raised by denaturalization laws and procedures *E.g., Schneiderman* v. *United States*, 320 U.S. 118; *Knauer* v. *United States*, 328 U.S. 654. More recent denaturalization provisions in the Immigration and Nationality Act of 1952 (Act of June 27, 1952, c. 477, 66 Stat. 267) appear to raise new issues which no doubt will ultimately be presented to this Court—particularly the extent to which Congress, in the exercise of its specific power over naturalization (Const., Art. I, Sec. 8), and the "necessary and proper" clause *(ibid.)*, may condition the "privilege" of naturalization upon future conduct of events. But the extent to which a naturalized citizen stands on the same footing as a native-born citizen is a question which may properly await a case in which it is raised. The references throughout the Government's brief to cases involving denaturalization can be put to one side.

[2] The Government suggests that petitioner "appears" to be a dual national (Br., p. 35). The District Court made no finding, nor did the Immigration and Naturalization Service (see Proceedings (unprinted) on file in the Clerk's office), that petitioner has or had any citizenship other than the American one here in issue.

We should also correct the Government's statement (Br. p. 36) that "There is no reason to believe that [the petitioner] will be unable to live in Mexico." There is "reason to believe" quite the opposite—that petitioner can *not* take up life in Mexico if deported there. The record of his hearing before the Special Inquiry Officer on July 16, 1953 (unprinted, on file with the Clerk) reveals (at p. 11) that when petitioner was asked to name the country to which he wished to be "deported", he

a native-born American citizen who, by reason of foreign law, is already a "dual national" must be accorded precisely equal protection. The extent of the power of Congress cannot be stated in quite the same way, because such a citizen already has a foreign nationality. For him the test can be said to be" has he, by some voluntary act, shown that he has made a firm decision to elect his foreign nationality.

This definition of the limits on Congressional power to de-citizenize native-born Americans is, we believe, consistent (a) with the historic basis of our attitude toward American citizenship; (b) with the prior decisions of this Court; and (c) with the consideration stressed by the Government—the necessity that Congress be enabled to deal with problems vis-a-vis other nations arising from dual or conflicting claims of citizenship and allegiance.

a. For almost the first century under the Constitution, far from asserting any power to deprive a native-born American of citizenship, Congress was concerned with whether such citizenship could be relinquished even where the citizen wished to do so. Even when, in 1868 (Act of July 27, 1868, c. 249, 15 Stat. 223), Congress declared expatriation—the *voluntary* renunciation of citizenship, *Perkins* v. *Elg*, 307 U.S. 325, 334—to be "a natural and inherent right", it asserted no correlative power to deprive a citizen of his nationality and deport him, such as is now asserted in this case. That assertion of power comes very late in our constitutional history.[3]

---

reluctantly answered "Mexico, as my family is there, but they are going to throw me out there, too." The Officer made no further inquiry, and the District Court made no finding to support the Government's easy assumption that upon petitioner's deportation he can become a permanent inhabitant of Mexico.

[3] It may be argued that the Act of March 3, 1865 (c. 79, 13 Stat. 490) represented an assertion of such power. That it was enacted *before* Congress recognized *any* right of expatriation; that it referred only to "rights of citizenship", rather than "citizenship" or "nationality"; and

b. The absence of Congressional power to declare citizenship forfeit for such acts as to it seem appropriate is wholly consistent with the decisions of this Court. On the one hand, there is the clear recognition of the status of native-born citizenship as a *constitutional* right. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703. The Court there made it clear that irrespective of the fact that one's parents were aliens ineligible for citizenship, one who is born in this country cannot, by legislative fiat, be deprived of a constitutional birthright—American citizenship. It noted that, although the Constitution specifically delegates to Congress a power to prescribe rules for naturalization, it is wholly silent on any grant of power to Congress to take away the citizenship which one acquires by birth in the United States and under its jurisdiction. Rights of individuals which arise from the Constitution are not—at least to now—subject to being taken away by a statute providing for administrative forfeiture.[4]

On the other hand, there is the very limited scope of the two decisions of this Court most relevant to this issue—*Mackenzie* v. *Hare*, 239 U.S. 299, and *Savorgnan* v. *United States*, 338 U.S. 491. In each, a native-born citizen voluntarily acquired a foreign citizenship—an act which is "one of the most obvious and effective forms of expatriation." *Savorgnan* v. *United States*, 338 U.S. 491, 498. We agree

that it was imposed only as a penalty after criminal conviction, *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; are among the many factors which suggest that Congress had no intention of asserting any power such as it has sought to exercise in this case. See Roche, *The Loss of American Nationality*, 99 U. of Pa. L. Rev. 25, 26, 61 *et seq.* (1950).

[4] Congress may of course enact laws which punish proscribed conduct by deprivation of rights otherwise constitutionally protected—even life itself. Whether it could deprive a native-born citizen of his citizenship on *that* basis—as a criminal penalty—is not at issue here. The Government in effect concedes (Br. pp. 50-58) that the result reached here cannot be sustained as a punishment, since the constitutional protections accorded in criminal cases were wholly lacking.

that Congress may provide that one who thus elects to accept a foreign citizenship will not be heard to say that he did not intend to renounce American citizenship. In such cases the citizen is performing an unequivocal act which can at all times be interpreted as inconsistent with American citizenship. But decisions sustaining the power to make such an act conclusive evidence of renunciation lend no support to the validity of an equally conclusive presumption when the specified acts—such as voting in a foreign political election (Sec. 401(e))—do not require, and certainly do not necessarily connote—the acquisition of a new allegiance to a foreign power.[5]

c. It cannot be mere happenstance that the Court, while emphasizing the constitutional basis of citizenship, has recognized as an act of involuntary expatriation—an act as to which a subjective intent not to become expatriated is irrelevant—only the acquisition of a foreign citizenship. Foreign naturalization, as the Court pointed out in *Mackenzie* v. *Hare*, is an act which, in its international aspects, "may bring the Government into embarrassments and, it may be, into controversies." 239 U.S. at p. 312. The same can no doubt be said of an oath of allegiance to a foreign state. Of course Congress may, if it wishes, permit an American citizen to retain his citizenship, and assume such embarrassments and controversies as may arise.[6] But in the proper conduct of foreign affairs it may, and in Section 401(a) and (b) of the Act it has, accepted the view of the 1906 Citizenship Board: "No man should be permitted de-

[5] We need not consider the extent to which Congress might declare that acts such as voting in a foreign election should be presumptive evidence of voluntary abandonment of American citizenship. The present statute can be construed only as making the presumption conclusive.

[6] It has done so, for example, in the Cable Act, repealing the statute involved in *Mackenzie* v. *Hare*, Act of September 22, 1922, c. 411, 42 Stat. 1022.

liberately to place himself in a position where his services may be claimed by more than one government and his allegiance be due to more than one." H. Doc. No. 326, 59th Cong., 2d Sess., p. 23.

The significant fact, however, is that there is no such basis for the power which Congress has asserted in the two sections involved in this case—remaining out of the country to avoid the draft (Sec. 401(j)), and voting in a foreign political election (Sec. 401(e)). As to the former, the Government asserts (pp. 41, 46) that "international complications" may be involved, but as described, rather than asserted, they appear to be no more than the usual problems which arise whenever an American who has committed a serious crime flees or remains outside this country. Presumably the Government does not mean to suggest that citizenship can be made forfeit whenever any American commits a crime and becomes an international fugitive from justice. And as to voting, if a foreign country does not object to aliens doing so, there are patently no international problems.

II

The "Expatriating" Acts Here Involved

In our main brief, pp. 27-45, we have already dealt at length with the further objection to the two subsections here involved—that they are arbitrary and invalid under the Fifth Amendment. The brief filed by the Government, however, warrants brief additional comment.

A. *Section 401(j).* Our only additional comments in connection with the validity of this subsection relate to its nature as a criminal penalty. We do not disagree with the Government's assertion (p. 40) that the problem of draft evaders in a period of national emergency is serious, and that there are additional problems presented by persons

who, by flight from the country, avoid what the Government calls "ordinary criminal sanctions" (p. 41). What we cannot accept is the conclusion which the Government, while denying in words, appears willing to accept in fact—that this justifies an "extraordinary" criminal sanction, the forfeiture of citizenship.

We cannot otherwise construe the Government's extensive reliance (pp. 41-46) on Section 21 of the Act of March 3, 1865 (c. 79, 13 Stat. 490), which forfeited the "rights of citizenship" of draft evaders, whether they left the United States or not. That act imposed a criminal penalty, and because it did so, it required a criminal conviction before the forfeiture could be invoked. *Kurtz* v. *Moffitt*, 115 U.S. 487, 501; *Huber* v. *Reily*, 53 Pa. 112, 119 (1866). Nor can we find anything but a clear implication of punishment in the comments of the Attorney General, which the Government twice quotes (pp. 45, 54) that draft evaders who leave the United States are "less worthy of citizenship" than are persons already subject to the expatriation laws. Nor is it helpful in dispelling this impression to find the comments of the Chairmen of the Senate and House Committees who reported legislation based on the Attorney General's proposal, and who characterized it as imposing a penalty (our main brief, pp. 37-39), as "the looseness of common parlance (Gov't Br., p. 55). And if this be "penalty" or "punishment" for unworthy conduct, admittedly it cannot be sustained. Hence we do not need to consider whether the crime is so great that it may be punished by the most severe of all punishments next to loss of life itself—banishment.

B. *Section 401(e).* Our additional comment with respect to this subsection is basically the statement of our complete disagreement with the Government's characterization of the implications of voting. Congress has here undertaken

to say that voting, under any and all circumstances, is conclusive evidence of abandonment of citizenship. The Government's brief, significantly, does not go so far; it speaks only of what is "normally" the case (p. 39). Even on that more limited basis—which does not suffice to sustain the absolute rule of the statute—we believe the statement is wrong. When a foreign country permits an American citizen to vote, his exercise of that right does not, we submit, connote "a strong attachment to that state", or evidence "a form of political allegiance" (Gov't Br., p. 39). It shows an interest in the affairs of a place where one may be temporarily resident, but to express—by a vote—a preference as to whether beer or wine should be sold in a Canadian town, or to seek—by a vote—to prevent a Communist form of government in a country friendly to the United States, has nothing to do with attachment or allegiance to a foreign state. Because voting in a foreign political election might, under some circumstances, imply political allegiance to a foreign state, is certainly no sufficient basis for a conclusive presumption to that effect.[7]

The lack of rational connection between voting in a foreign election and allegiance to the United States is also illuminated by two other considerations. In the first place, subsection (e) appears to have originated in a desire on the part of Congress to penalize certain American citizens who had taken an active part in the affairs of the Fascist governments of Germany and Italy in the early 1930's, and who particularly had voted in the Saar plebiscite of January 1935. On February 15, 1935, H. R. 5799, 74th Congress,

[7] Perhaps there is no reason why Congress must be consistent in this field, but there is a certain inescapable irony in the claim that voting in a foreign political election necessarily forfeits citizenship because of the political allegiance which it connotes, whereas becoming a foreign princess and the mother of a future foreign ruler, as has recently occurred to a well-known American citizen, has no effect on her American citizenship.

was introduced. The Committee on Immigration and Naturalization of the House of Representatives reported it favorably (H. Rep. No. 216) stating that the purpose of the bill was "to provide *the penalty of loss of citizenship and nationality* upon any citizen or national of the United States who may hereafter leave the United States and vote in a political election in a foreign state * * *" (italics supplied) Subsection (e) of Section 401, which followed five years later, is identical, in substance and closely parallel in the words, to H. R. 5799. Fifteen years later, a special subcommittee of the House Judiciary Committee, referring to and quoting from the earlier report, stated that it "agrees that the purpose of Section 401(e) is * * * 'to serve lawful notice that hereafter citizenship * * * does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage.'" H. Rep. No. 1469, 81st Con., 2d Sess., p. 9.

In the second place, the arbitrary and sweeping character of the assumption as to the significance of voting upon which subsection (e) is sought to be sustained has been repudiated, from time to time, by Congress itself. In 1946, Congress provided that all American citizens who had up to that time voted in political elections in any state other than one at war with the United States could regain their prior citizenship status by taking, within a year, an oath of allegiance to the United States. Act of August 7, 1946, c. 769, 60 Stat. 865. In 1951, it extended the same rights to those who had voted in Italian elections in 1946 and 1948 (Act of August 16, 1951, c. 321, 65 Stat. 191), and in 1954 to those who had voted in Japan between 1945 and 1952 (Act of July 20, 1954, c. 553, 68 Stat. 495).

Having originated as a penalty, and having become overburdensome in many instances because of its sweeping, un-

warranted and conclusive assumptions, it cannot now be sustained as simply a rational judgment, immune from judicial examination, that foreign voting is so inconsistent with true American citizenship that they cannot co-exist. It remains, in fact, as it was when it was first introduced into the law in 1940—a penalty for conduct Congress doesn't like. It should be so evaluated, and be declared invalid.

Respectfully submitted,

CHARLES A. HORSKY,
701 Union Trust Building,
Washington 5, D. C.,

FRED OKRAND,
A. L. WIRIN,
YALE KAMISAR,
Counsel for Petitioner.

JACK WASSERMAN,
Ass'n of Immigration and
Nationality Lawyers,

SALVATORE C. J. FUSCO,
Of Counsel.

APRIL, 1957.

Office Supreme Court, U.S.
FILED
SEP 23 1957
JOHN T. FEY, Clerk

No. 44, 19, and 70

In the Supreme Court of the United States

OCTOBER TERM, 1957

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
OSCAR H. DAVIS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
J. F. BISHOP,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
I. Further comments on the general power of Congress to designate what conduct shall effect loss of American nationality	2
A. Powers inherent in the United States as a sovereign nation	2
B. Powers expressly granted by the Constitution	5
1. Section 401 (e)—service by a dual-national in the forces of his other state	5
2. Section 401 (e)—voting in a foreign political election	6
3. Section 401 (j)—remaining abroad to evade military service	6
4. Section 401 (g)—deserting the armed forces in wartime	7
II. Mitigation and amelioration of the consequences of expatriation	7
III. Additional comments on the provisions for loss of nationality for remaining abroad to evade the draft (Section 401 (j)) and for desertion in wartime (Section 401 (g))	11
IV. Additional discussion of conscription as proving duress	23
Conclusion	29

CITATIONS

Cases:

Acheson v. *Maenza*, 202 F. 2d 453	26
Acheson v. *Murata*, 342 U. S. 900	23
Acheson v. *Okimura*, 342 U. S. 899	23
Alata v. *Dulles*, 221 F. 2d 52	27
Augello v. *Dulles*, 220 F. 2d 344	27
Bocce v. *Dulles*, 226 F. 2d 265	28
Bruni v. *Dulles*, 235 F. 2d 855	28
Burnet v. *Brooks*, 288 U. S. 378	3
Carlisle v. *United States*, 16 Wall. 147	10

Cases—Continued Page

Claassen v. *United States*, 142 U. S. 140 20
Coumas v. *Brownell*, 222 F. 2d 331 24, 25
DeMarco v. *Dulles*, 226 F. 2d 265 28
Dos Reis v. *Nicolls*, 161 F. 2d 860 25
Fowler v. *Wilkinson*, 353 U. S. 583 20
Garland, Ex parte, 4 Wall. 333 10
Gotcheus v. *Matheson*, 58 Barb. 152 7, 13, 18
Huber v. *Reily*, 53 Pa. 112 13
Jackson v. *Taylor*, 353 U. S. 569 20
Knote v. *United States*, 95 U. S. 149 10
Lehmann v. *Acheson*, 206 F. 2d 592 26
Mackenzie v. *Hare*, 239 U. S. 299 2, 3, 9
Mandoli v. *Acheson*, 344 U. S. 133 23
McCafferty v. *Guyer*, 59 Pa. 109 13
Monaco v. *Dulles*, 210 F. 2d 760 27
Osborn v. *United States*, 91 U. S. 474 10
Pandolfo v. *Acheson*, 202 F. 2d 38 26
Perri v. *Dulles*, 206 F. 2d 586 27
Perri v. *Dulles*, 230 F. 2d 259 27
Pinkerton v. *United States*, 328 U. S. 640 20
Podea v. *Acheson*, 179 F. 2d 306 25
Santi v. *Dulles*, 226 F. 2d 266 28
Savorgnan v. *United States*, 338 U. S. 491 3, 8
Severance v. *Healey*, 50 N. H. 448 13
Soccodato v. *Dulles*, 226 F. 2d 243 27–28
Stipa v. *Dulles*, 233 F. 2d 551 28
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 2, 3
United States v. *Klein*, 13 Wall. 128 10
Zimmer v. *Acheson*, 191 F. 2d 209 24

Constitution and Statutes:

Constitution of the United States:

Article I, Sec. 8 2, 3
Fifth Amendment 4

Statutes and Proclamation:

Act of April 20, 1818, Secs. 1 and 2, 3 Stat. 447, 448 5
Act of March 3, 1865, 13 Stat. 487, 490, c. 79, Sec. 21 8, 11, 14
Act of August 22, 1912, 37 Stat. 356 9, 15
Act of August 7, 1946, 60 Stat. 865 8
Act of August 16, 1951, 65 Stat. 191 8
Act of July 20, 1954, 68 Stat. 495 8

Statutes and Proclamation—Continued
Citizenship Act of 1907, 34 Stat. 1228: Page
Sec. 2 ... 8
Sec. 3 ... 9
Expiration Act of 1954, 68 Stat. 1146 ... 11
Immigration and Nationality Act of 1952, 66 Stat. 163 ... 8
Sec. 324 (8 U. S. C. 1435) ... 9–10
Sec. 327 (8 U. S. C. 1438) ... 8
Nationality Act of 1940 (54 Stat. 1137), as amended:
Sec. 401 (b) ... 8, 17, 18
(c) ... 5, 8
(d) ... 13
(e) ... 6
(g) ... 7, 9, 10, 11, 17, 18, 19, 20, 22
(h) ... 10
(j) ... 6, 11
Revised Statutes 5281–5282 ... 5
40 Stat. 340, 542 ... 8
18 U. S. C. 958, 959 ... 5
Presidential Proclamation, March 5, 1924, 43 Stat. 1940 ... 10
Miscellaneous:
Cong. Globe, 38th Cong., 2d Sess., pp. 280, 298, 338, 974–980, 1034–1035, 1074, 1114, 1154–1155, 1160–1161, 1169 ... 14
Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572–573, 604–616, 609, 631–643 ... 14
Cong. Globe, 38th Cong., 2d Sess., pp. 642–643, 1155, 1378 ... 15
Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294–1295, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413 ... 14
48 Cong. Rec.:
pp. 2903–4 ... 16
pp. 2903–5, 9542, 11131 ... 15
p. 2904 ... 9
p. 9542 ... 16
89 Cong. Rec. 3239–3245, 7107–7108, 10134–10135, 10974–10976 ... 19
90 Cong. Rec. 123, 129 ... 19

Miscellaneous—Continued

	Page
100 Cong. Rec. 11279–11280, 11281	11
22 Ency. Brit. (1948), p. 810	18
Exec. Order No. 9048, Feb. 3, 1942, 7 F. R. 775	22
Foreign Relations, 1873, Part 2, p. 1187	12
H. R. 678, 38th Cong., 2d Sess	14
H. R. 17483, 62d Cong., 2d Sess	14, 15
H. Rep. No. 335, 62d Cong., 2d Sess	15
H. Rep. No. 302, 78th Cong., 1st Sess	19
Laws Concerning Nationality (U. N. Leg. Ser. 1954)	3
Manual for Courts-Martial, 1928, par. 104, p. 96	21
41 Op. Atty. Gen. No. 16	27
S. 408, 38th Cong., 2d Sess	14
S. Rep. No. 910, 62d Cong., 2d Sess	15, 16
S. Rep. No. 382, 78th Cong., 1st Sess	10, 13, 19
War Dept. Circular No. 273, Sec. VI, of 1942, Compilation of War Department General Orders, Bulletins and Circulars, Jan. 1, 1943 (G. P. O.), p. 343	22
Winthrop, *Military Law and Precedents*, 2d ed., p. 645	17, 21

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 44

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

This supplemental brief on reargument will be devoted to (*a*) clarification of certain arguments made

in our initial briefs and at the original oral hearings, (*b*) presentation of some materials and arguments not included in our initial briefs, and (*c*) a response to certain of the contentions made by the petitioners last term or on the reargument.

I. FURTHER COMMENTS ON THE GENERAL POWER OF CONGRESS TO DESIGNATE WHAT CONDUCT SHALL EFFECT LOSS OF AMERICAN NATIONALITY

In our original brief in *Perez* (at pp. 13–37), we discussed at some length the general power of Congress to establish standards for loss of American nationality and to designate what voluntary conduct shall effect loss of citizenship even though the citizen does not desire or intend to lose his American nationality. In this supplemental brief, we would add the following:

A. POWERS INHERENT IN THE UNITED STATES AS A SOVEREIGN NATION

1. Our primary position is that, as this Court held in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, the power of Congress over denationalization exists even though it is not spelled out in Article I, Section 8, of the Constitution. There are many examples of such powers inherent in national sovereignty, though unexpressed in the Constitution, which this country possesses as a member of the family of nations, together with the other states of the world. See, *e. g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. The Necessary and Proper Clause recognizes the existence of such authority when it provides that Congress shall have the power not only to make all laws necessary and

proper for carrying into execution "the foregoing Powers", *i. e.*, those granted by Article I, Section 8, but also the authority to make all laws necessary and proper for carrying into execution "*all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis added).

Among the "other Powers vested by this Constitution in the Government of the United States" are those which are "inherently inseparable from the conception of nationality" (*United States* v. *Curtiss-Wright Corp., supra*), or are "necessary to maintain an effective control of international relations" (*Burnet* v. *Brooks*, 288 U. S. 378, 396). That the general power to enact loss-of-nationality legislation falls into these categories, fundamental to the authority of all sovereign nations, is shown by the simple fact that almost every nation has adopted various provisions of this kind. See Laws Concerning Nationality (U. N. Leg. Ser. 1954). And if Congress, alone among the legislative bodies of the world, has no such general power, then it could not even provide for the expatriation of Americans who voluntarily assumed the nationality of another country or took a foreign oath of allegiance, at least where the citizen desired to retain his United States nationality. But cf. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491. The petitioners in *Perez*, No. 44, and *Trop*, No. 70, explicitly recognize that that cannot be the law. See our original brief in *Perez*, pp. 13–15.

2. This general power over expatriation undoubtedly has its limits. No specific constitutional provi-

sion or prohibition governs, but the Due Process Clause of the Fifth Amendment would condemn any arbitrary or unreasonable use of the power. As stated in our initial brief in *Perez*, pp. 34–35, we suggest that it would be arbitrary and unreasonable to attach the severe consequence of denationalization to conduct which is not closely related to the cardinal elements of nationality and allegiance. But the primary responsibility is Congress's, and the choice is for it to make. The overseeing power of the courts lies within narrow confines.

In each instance, the courts must consider and weigh a multitude of factors before the legislation can be invalidated: (*a*) the general relationship of the statute to our dealings with other countries; (*b*) the possibility of international embarrassments, controversies, or conflicts of allegiance; (*c*) the citizen's showing of preference, by performing the designated act, for another country over this one, or of lack of attachment to this country; (*d*) the citizen's repudiation, by performing the designated act, of his total obligations as a citizen of this country, or of the highest demands of citizenship; (*e*) the history and general acceptance of the particular legislation; (*f*) the factual showing, and the other considerations, on which Congress acted; (*g*) the practice of other nations with comparable ideals and systems of government.

In our main briefs in *Perez* and *Trop*, we have discussed, in terms of the foregoing factors, the four denationalization provisions involved in these cases. There is additional discussion in Point III, *infra*, pp.

11 *ff.* On the basis of this discussion, we submit that none of these four provisions can be characterized as an arbitrary or capricious exercise of the powers over nationality inherent in the United States as a sovereign nation.

B. POWERS EXPRESSLY GRANTED BY THE CONSTITUTION

Even if we are wrong, and Congressional power over denationalization must be found in, implied from, or appurtenant to, a power expressly granted to Congress by the Constitution, there is adequate warrant for each of the four statutory provisions at stake in these cases. We believe that they are supported by the war power, the powers to raise and support armies and to make rules for the government of the forces, and the power of Congress to regulate our relations and intercourse with foreign nations—taken together with the Necessary and Proper Clause.[1]

1. *Section 401 (c)—service by a dual-national in the forces of his other state.* Under its express power to regulate foreign affairs, Congress has, for almost 140 years, prohibited the acceptance within the United States of a commission in a foreign army at war with a nation with which this country is at peace, or the enlistment within the United States in any foreign army. Act of April 20, 1818, secs. 1 and 2, 3 Stat. 447, 448; Rev. Stat. 5281–5282; now 18 U. S. C. 958, 959. The same constitutional power would obviously sustain a criminal prohibition against the voluntary entry, outside the United States, of an American dual-national into the forces of his other state. Similarly,

[1] Involved in the *Nishikawa* case, No. 19.

we submit that it is a "necessary and proper" incident to its power over foreign affairs for Congress to provide, not criminal punishment, but loss-of-nationality for such a dual-national—in order (*a*) to avoid conflict with the state of the other nationality over the military service of the dual-national, (*b*) to avoid conflict with third countries against whom the dual-national may have to fight, and (*c*) to avoid having a dual-national, like Nishikawa, fight against this country. See also our main *Perez* brief, pp. 38–39.

2. *Section 401 (e)—voting in a foreign political election.*[2] This provision, too, falls within the ambit of Congress's power to regulate intercourse with foreign countries. To avoid international conflicts and to preserve the integrity of American political processes and the singleness of American allegiance, Congress could, under its granted powers, prohibit voting abroad by Americans. By the same token, it is a "necessary and proper" incident of the granted power to achieve those results by severing the cord of allegiance between the United States and the American who voluntarily votes abroad. See also our main *Perez* brief, pp. 39–40.

3. *Section 401 (j)—remaining abroad to evade military service.*[3] This subsection is sustained by the war power, the power to raise armies, and also the foreign affairs power. The relationship to the draft and to the power to wage war are manifest; the foreign affairs power is invoked by the potential conflicts incident to

[2] Involved in the *Perez* case, No. 44.

[3] Involved in the *Perez* case, No. 44, and the *Mendoza-Martinez* case, No. 54, this Term, pending on petition for a writ of certiorari.

the draft-evader's taking refuge in a foreign country and thus seeking its asylum and protection against our Selective Service System. See also our main *Perez* brief, pp. 40–49, and Point III, *infra*, pp. 11 *ff.*

4. *Section 401 (g)—deserting the armed forces in wartime.*[4] Subsection (g) finds its constitutional warrant in the express powers to wage war, to raise armies, and to regulate the government of the armed forces. Desertion is a very grave injury to the effective waging of any war, as well as to the maintenance intact of the armed force which is being raised; and the Articles of War have always prohibited desertion, as part of the "Rules for the Government and Regulation of the land and naval Forces". The substantive power to deal with desertion in "necessary and proper" fashion clearly exists. See *Gotcheus v. Matheson*, 58 Barb. 152, 155. The propriety of imposing denationalization for wartime desertion is discussed in detail in our main *Perez* brief, at pp. 49–50, our main *Trop* brief, and Point III, *infra*, pp. 11 *ff.*

II. MITIGATION AND AMELIORATION OF THE CONSEQUENCES OF EXPATRIATION

1. It is appropriate to point out explicitly, in discussing the general validity of expatriation legislation, that Congress has always been aware that some of its enactments in this area may lead to harsh results, and has therefore provided for various types of mitigation and amelioration.

For example, after World War I, Congress passed special short-form naturalization statutes "to assist men to regain their American citizenship after they

[4] Involved in the *Trop* case, No. 70.

had expatriated themselves by taking a foreign oath of allegiance required to permit them to enlist in the armies of certain foreign nations." See *Savorgnan v. United States*, 338 U. S. 491, 501 (fn. 17); 40 Stat. 340, 542.[5] Similarly, after World War II, Congress enacted such special naturalization provisions for men who had served in *non-enemy* armies during World War II, and thus may have lost their nationality under Section 401 (c) of the 1940 Act, or, under Section 401 (b), by taking a foreign oath of allegiance. See Section 327 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 248, 8 U. S. C. 1438.

For those who lost their citizenship through voting in foreign political elections, Congress, in the years after World War II, also offered the relief of short-form naturalization. See the Act of August 7, 1946, 60 Stat. 865 (applicable to voting before that date, in elections in non-enemy states);[6] Act of August 16, 1951, 65 Stat. 191 (extending the same privilege to those voting in Italian elections in 1946 and 1948); Act of July 20, 1954, 68 Stat. 495 (the same for those voting in occupied Japan).

With respect to loss of nationality for desertion and draft-evasion, the Act of March 3, 1865, 13 Stat. 487 (discussed in our main *Perez* brief, pp. 41 *ff*, the *Trop* brief, and *infra*, pp. 11 *ff*) contained the "built-in" relief provision that it did not apply to those who re-

---

[5] Taking a foreign oath of allegiance was an act of expatriation under Section 2 of the Citizenship Act of 1907, 34 Stat. 1228.

[6] In No. 11, petitioner Perez, who had voted in Mexico in 1946, could have taken advantage of this ameliorating statute, but did not do so within the year prescribed by the Act.

turned within 60 days after a Presidential proclamation required by the Act to be issued. In 1912, the 1865 Act was modified to make it inapplicable to peacetime desertions (Act of August 22, 1912, 37 Stat. 356), and it was also expressly provided "That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests * * *."[7] In similar fashion, Section 401 (g) of the 1940 Act, relating to wartime desertion, was deliberately amended, during World War II, not to apply to servicemen convicted of desertion but who had served their sentences and been restored to duty. See our main *Trop* brief, p. 9, and *infra*, pp. 17, 19.

American women who, like Mrs. Mackenzie of *Mackenzie* v. *Hare*, 239 U. S. 299, lost their nationality by marrying a foreigner, between 1907 and 1922, have also been granted the comparable relief of easy, short-form naturalization (at first, after the dissolution of the marriage, and later even during the existence of the marriage). See Section 3 of the Citizenship Act of 1907, 34 Stat. 1228; Section 324 of the

[7] This provision was described on the floor of the House by Congressman Roberts, the author of the 1912 amendment, as a "further provision in the bill so that the President, upon application, *could restore citizenship* in these cases where it had been forfeited prior to the passage of the act and thus restore these young men to their rights as American citizens" (48 Cong. Rec. 2904, emphasis added).

For the revealing legislative history of the 1912 Act, see *infra*, pp. 15-17.

Immigration and Nationality Act of 1952, 66 Stat. 246, 8 U. S. C. 1435.

2. At least with respect to the statutory provisions hinging loss of nationality on conviction of a crime (e. g., Section 401 (g) (desertion) and (h) (treason) of the 1940 Act), a Presidential pardon for the offense would also seem to restore nationality. In "blotting" out the offense and removing all "disabilities",[8] the pardon obliterates the necessary foundation for the loss-of-citizenship. By a proclamation of March 5, 1924, 43 Stat. 1940, President Coolidge pardoned all World War I deserters whose offense was committed after the Armistice and before the formal ending of the war, and thus restored all rights, including nationality, which had been lost under the desertion provisions of the 1865 Act. See the letter of Secretary of War Stimson, dated March 6, 1943, proposing the present version of Section 401 (g) of the 1940 Act (S. Rep. No. 382, 78th Cong., 1st Sess.): "Citizenship may be restored by Presidential pardon, granted in each individual case, or by proclamation as was done by the amnesty and pardon proclamation of President Coolidge of March 5, 1924, restoring the citizenship of those soldiers convicted of desertion after the armistice of November 11, 1918, but prior to the formal end of the war on July 2, 1921." See

[8] See *Ex parte Garland*, 4 Wall. 333, 380–1; *United States* v. *Klein*, 13 Wall. 128; *Carlisle* v. *United States*, 16 Wall. 147, 151; *Osborn* v. *United States*, 91 U. S. 474, 478; *Knote* v. *United States*, 95 U. S. 149, 153.

also the pardon provision of the 1912 Act, *supra*, p. 9, and footnote 7.[9]

III. ADDITIONAL COMMENTS ON THE PROVISIONS FOR LOSS OF NATIONALITY FOR REMAINING ABROAD TO EVADE THE DRAFT (SECTION 401 (J)) AND FOR DESERTION IN WARTIME (SECTION 401 (G))

A. As pointed out in our original *Perez* brief, at pp. 41, *et seq.*, both Section 401 (j) (draft-evasion) and Section 401 (g) (desertion) of the 1940 Act stem from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of deserters and enrolled draftees who departed from their districts or from the United States with intent to avoid military service—with mitigating provisions for those who returned before a certain date. These provisions of the 1940 Act therefore now have almost a hundred years of history—and general acceptance—behind them.

As shown in the *Perez* brief, pp. 42–43, the 1865 statute has been considered a provision for loss-of-

[9] In discussing the Expatriation Act of 1954, 68 Stat. 1146 (which is not involved in any of the present cases), Representatives Keating and Robsion stated that a Presidential pardon could not restore nationality, and that the expatriated individual's status could never be changed except by Act of Congress. 100 Cong. Rec. 11279–11280, 11281. At least insofar as the denationalization follows upon conviction of a crime, we do not agree with this view; a full pardon would appear to restore the *status quo ante* the crime and thus to restore nationality. As the text shows, President Coolidge was apparently of the same view. And, in any event, Congress could clearly provide that a Presidential pardon should have the effect of restoring nationality. It did so in 1912 (see *supra*, p. 9); and in 1944 it amended Section 401 (g) of the 1940 Act to provide for restoration of nationality if the deserter was reinstated in the armed forces (see *infra*, pp. 17, 19).

citizenship and not merely one depriving the draft-evader or deserter of political rights. Additional evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign relations,* 1873, Part 2, p. 1187):[10]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens,* and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490.) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens,* and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.][11]

---

[10] This was less than a decade after the passage of the 1865 Act.

[11] Note that Congress took pains to prescribe that the draft-evaders and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are terms appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship; in the

Several of the 19th century cases which applied this provision of the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Severance* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*, 53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several times), "deprivation of his citizenship of the United States", per Strong, J.).[12] See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which is now Section 401 (d) of the 1940 Act, and referring to the prior law (the 1865 Act, as amended), as dealing with loss of "citizenship" which can be restored. See S. Rep. No. 382, 78th Cong., 1st Sess., *supra*, p. 10.

B. The legislative history of the 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is

latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription.

[12] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

clear that the Congress then recognized the provision as one for full loss of nationality.

1. The pertinent 1865 provision—Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[13] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678 (passed by the House only), of the 38th Congress, 2d session.[14]

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion

[13] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294–5, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

[14] For the history of H. R. 678, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 280, 298, 338, 974–980, 1034–5, 1074, 1114, 1154–5, 1160–1, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572–3, 604–616, 609, 631–643.

and draft-evasion certainly stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642–3, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship; the country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation; the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision did characterize it in these general terms which unmistakably refer to citizenship as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor*, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643 (emphasis added).

2. The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356)[15] are perfectly plain that Congress then viewed the 1865 statute as imposing loss of citizenship in the fullest sense, and that Congress wished to continue that provision only for wartime desertions.

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the great severity of the 1865

[15] H. R. 17483, 62d Cong., 2d Sess.; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903–5, 9542, 11131.

Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the *fearful penalty* imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[16] [Emphasis added.]

On the floor of the House, Representative Roberts, the author of the bill, emphasized the extreme harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed of citizenship", and "loss of rights of citizenship" interchangeably. 48 Cong. Rec. 2903–4. See, also his reference to restoration of citizenship in the quotation set forth in footnote 7, *supra*, p. 9.[17] There is no doubt

[16] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

[17] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion, just as does Section 401 (g) of the 1940 Act.

C. As pointed out in our main *Trop* brief, pp. 6–9, there are several reasons why we do not think it possible to read Section 401 (g) of the 1940 Act as relating only to desertion *to the enemy*.

1. The subsection simply says "[d]eserting the military or naval forces of the United States in time of war", and it specifically refers to conviction "by court martial"; in military law the offense of desertion has never required desertion to the enemy.

2. The provision in Section 401 (g) for restoration of citizenship upon further wartime service would have little significance if the only desertion covered by the subsection were desertion to the enemy. A deserter to the enemy is very unlikely to return to our forces or, if he did, to be restored to duty; such cases of restoration would be far too rare to be of any concern to Congress (and, as shown *infra*, Congress was not in fact concerned with deserters-to-the-enemy when it enacted the restoration proviso in 1944). Moreover, a deserter to the enemy would in all probability be guilty of treason and thus covered by Section 401 (b) of the 1940 Act; subsection (g) would be superfluous and unnecessary if petitioner Trop were right in his construction.[18]

[18] Winthrop, *Military Law and Precedents*, 2d ed., p. 645, points out that "[d]esertion to the enemy is almost invariably punished with death", another circumstance which would render Section 401 (g) superfluous if petitioner were correct.

3. Like the treason provision (subsection (h)), and unlike most of the other subsections of Section 401 of the 1940 Act, the desertion clause (subsection (g)) is expressly worded so that the act of expatriation does *not* have to occur abroad; and desertion-to-the-enemy within the United States was so improbable, in 1940 when the statute was adopted, that it cannot be thought to be Congress's only (or main) concern.

In sum, even on the bare face of Section 401—without resort to antecedent or direct legislative history—it is plain that all wartime military desertions are covered, and not merely desertions-to-the-enemy.

4. The history of Section 401 (g), both its historical background and its immediate history, provides the final and conclusive answer to Trop's contention. First, it seems clear that the progenitor of the subsection, the 1865 Act, was adopted in March 1865 not primarily to deal with desertions to the enemy, which could not have been numerous at that late stage of the Civil War (six weeks before Lee's surrender),[19] but rather to cover the many desertions to Canada, Mexico, or just back home, by the soldiers of the victorious Union army. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 155–156. Secondly, it is indisputable that, from 1865 to 1912, the 1865 Act applied to peacetime desertions and thus applied at a time when desertion to the enemy would have been impossible; "thousands" of soldiers were affected by the statute during that

[19] The Act of March 3, 1865, came a month after Sherman's march northward from Savannah, and at a time when the Confederate army had dropped to around 200,000 men, largely due to desertions. The Union army numbered just over a million at the time. See 22 Ency. Brit. (1918), p. 819.

long period. *Supra*, pp. 15–17. The Act was amended in 1912 to apply only to wartime *desertions*, but there was not the slightest indication that it was also to be modified to apply only to desertions-to-the-enemy; and during World War I, it was not so construed. *Supra*, pp. 9, 10, 15–17. As the direct descendant of the 1865 Act (as modified in 1912), Section 401 (g) of the 1940 Act could hardly have the much narrower purpose suggested by petitioner Trop.

Thirdly, the history of Section 401 of the 1940 Act, as it was originally enacted, does not even intimate that subsection (g), as it then stood, was limited to desertions to the enemy. And, as shown in our main *Trop* brief at p. 9, the history of the 1944 amendment which added the proviso to subsection (g) conclusively shows that the proviso was thought necessary to deal with the cases of the thousands of men who had simply deserted the forces—but not to the enemy—and had then been rehabilitated. The entire emphasis was on the men who deserted from camps or units in this country, or in overseas places of training and preparation like Great Britain; contact with the enemy was not considered of any significance. The statute was viewed in exactly the same way as the predecessor 1865 and 1912 Acts had been. See H. Rep. No. 302, 78th Cong., 1st Sess.; S. Rep. No. 382, 78th Cong., 1st Sess.; 89 Cong. Rec. 3239–3245, 7107–7108, 10134–5, 10974–10976; 90 Cong. Rec. 123, 129.

D. In his Supplemental Brief on Reargument, petitioner Trop advances the new contention that Section 401 (g) is inapplicable to his case because it has not been shown that he was dishonorably discharged from

the Army "as the result of" his conviction for desertion. He points out that his sentence was a gross one imposed on the three offenses for which he was convicted—escape; absence without leave; and desertion—and argues that for this reason it cannot be said to have been imposed "as the result of" his conviction for the offense of desertion.[20]

The short answer is furnished by the holdings of this Court, at its last Term, in *Jackson* v. *Taylor*, 353 U. S. 569, and *Fowler* v. *Wilkinson*, 353 U. S. 583, that in military law only the entry of a single gross sentence for all offenses is permitted; sentences broken down as to offenses are prohibited. In a case like this where the sentence is less than the maximum for each offense, the single gross sentence necessarily covers each and all of the convictions. 353 U. S. at 574, 578–9. In civil law, a general sentence on more than one count (a practice which is not required but merely permitted) applies as to any count which is good. *Pinkerton* v. *United States*, 328 U. S. 640, 641–2, fn. 1; *Claassen* v. *United States*, 142 U. S. 140, 146–7. There is all the more reason for accepting this rule in the military system where such gross sentences are required. On review within the military system—described in the *Jackson* and *Fowler* opinions—bad or invalid counts can be set aside and sentences reduced or mitigated.

In Trop's case, the sentence was required to include a dishonorable discharge because, in 1944, the con-

[20] It is to be noted that Section 401 (g) does not require the dishonorable discharge to be imposed *solely* as the result of a desertion conviction.

rolling Manual for Courts-Martial, 1928, required any sentence of confinement for more than six months to include a dishonorable discharge (though it might, of course, be suspended). MCM, 1928, par. 104, p. 96. On review, none of the three counts—and certainly not the desertion count, which was the most serious one—was set aside, and the full sentence, far from being mitigated, was approved "although inadequate" "in order that the accused will not entirely escape punishment" (R. 9). It must therefore be assumed that the full sentence, including the dishonorable discharge which was later executed, applies to each count, including the desertion count.[21]

If petitioner were correct in his argument, Section 401 (g) could never apply to a serviceman convicted of other offenses along with desertion and necessarily

[21] Moreover, it is wholly unrealistic to speculate, as petitioner does, that his dishonorable discharge may have been imposed because of the escapes or the absence-without-leave, and not for his desertion. Desertion is the most serious of the three crimes, and in addition the chronological sequence of petitioner's offenses shows that his desertion could not have been as technical or insignificant as he now alleges. He was convicted of some offense by general court-martial in North Africa in 1944 and confined in the NATOUSA Disciplinary Training Center (R. 8). He was then transferred to the stockade, 50th Station Hospital, and escaped from there on May 9, 1944 (R. 8). He remained absent without leave on that day (R. 9). On May 22, 1944, he escaped again (R. 8), and it was his absence after this second escape which was charged as, and found to be, desertion (R. 9). At that time his organization was in Italy, apparently in combat (R. 4).

Desertion in wartime is always a serious offense "visited with especial severity" (see Winthrop, *Military Law and Precedents*, 2d ed., p. 645), and a desertion in petitioner's circumstances—after two escapes and a prior absence-without-leave, and with the soldier's unit having gone into a combat area—would cer-

given a gross sentence (including a dishonorable discharge). In such a case the contention could always be made, as it is here, that "it cannot fairly be said" that the sentence of dishonorable discharge was the "result" of the desertion conviction rather than of the other convictions. Section 401 (g) could then apply, in petitioner's view, only to cases where the soldier was tried for desertion alone or separately. But in view of the common and praiseworthy practice of trying related offenses together in the military system, it cannot be supposed that Congress intended Section 401 (g) to apply only to the unusual instance in which desertion happened to be the only offense tried by the court-martial. Rather, Congress desired the provision for loss of nationality to apply in every case where (*a*) the soldier is convicted of wartime desertion, (*b*) he is sentenced to a dishonorable discharge on that conviction, (*c*) the conviction is upheld on review and the sentence is not mitigated but is ultimately executed, and (*d*) the conditions of the proviso of Section 401 (g) are not fulfilled. Trop meets all of these requirements.

---

tainly not be regarded lightly. By Exec. Order No. 9048, Feb. 3, 1942, 7 F. R. 775, the President had lifted the maximum limits on punishment for desertion (and related offenses) so that death could thereafter be imposed; and War Dept. Circular No. 273, Sec. VI, of 1942, had called this consequence—as well as the loss of citizenship for desertion—to the attention of the army, and had directed all unit commanders to explain to their soldiers the nature of these offenses and to "emphasize the serious consequences which may result from their violation". See Compilation of War Department General Orders, Bulletins and Circulars, Jan. 1, 1943 (G. P. O.), p. 343.

IV. ADDITIONAL DISCUSSION OF CONSCRIPTION AS PROVING DURESS [22]

In our main brief in *Nishikawa*, No. 19, we urged, among other points, that (*a*) mere proof of conscription into a foreign army was not in itself sufficient to establish a *prima facie* defense of duress, (b) on the facts found by the two courts below, conscription into the Japanese army was all that Nishikawa proved, and (*c*) the courts below did not err in holding that this proof was inadequate to avoid Nishikawa's loss of nationality. In this supplemental brief, we add some further comments on the role of conscription in determining the issue of duress.

A. We emphasize again that in *Acheson* v. *Murata*, 342 U. S. 900, and *Acheson* v. *Okimura*, 342 U. S. 899, this Court has already determined that proof of conscription into the foreign army is not enough to show duress. In each of those cases, the trial court had found, and it was undisputed, that the plaintiff had been conscripted into the Japanese army. Nevertheless, the Court remanded the cases for findings as to the circumstances surrounding the appellees' military service "and the reasonable inferences to be drawn therefrom". If conscription were enough, the judgments would have been affirmed without more; there would have been no need for further findings or for a remand.[23]

---

[22] This point is pertinent only to the *Nishikawa* case, No. 19.

[23] The dissenters in *Mandoli* v. *Acheson*, 344 U. S. 133, 139–140, also held that conscription, in and of itself, was not enough to show duress. The majority had no occasion to consider that issue.

B. The reported appellate cases on loss of nationality through foreign service, which are closest to *Nishikawa* on their facts, hold that the service was voluntary and not under duress. In this connection, we should also like to point out the factors additional to those present in this case which existed in the appellate cases in which the foreign military service was held to be involuntary.

1. In *Zimmer* v. *Acheson*, 191 F. 2d 209 (C. A. 10), Harry Ward Zimmer, a dual-national then living in Germany, was drafted, in 1940, into the German army; he made no report to the American consul and no effort to prevent his induction, except that he did tell the German draft board that he was an American and the board told him to "stay in line". "He testified that he was fearful harm would come to him or his wife; that they talked it over and decided that the war would not last very long and that perhaps the best thing to do would be to enter the army." 191 F. 2d at 210. The trial court held that his service was voluntary and the Tenth Circuit affirmed. 191 F. 2d at 212. As shown in our main brief, pp. 3–8, 45–48, Nishikawa's case is certainly no stronger than Zimmer's, and probably less strong since petitioner did not even inform the draft authorities that he was an American. The *Zimmer* case is directly in point.

Likewise in point is *Coumas* v. *Brownell*, 222 F. 2d 331 (C. A. 9), in which Coumas was held to have expatriated himself by taking the oath of allegiance when he was inducted into the Greek army in 1932. The court said: "It nowhere appears that he protested his induction, and he voluntarily went to Greece

[in 1932] presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army." 222 F. 2d at 332. The close resemblance to petitioner's case is plain.

2. In determining whether duress was present or not, each particular case must, of course, stand and be judged on its own complex of facts, factors, and circumstances. But it seems worthwhile to point out that, in the appellate cases in which duress was found, there was always some significant factor bearing on duress in addition to the elements present in Nishikawa's case.

In *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1), the claimant, on receiving his Portuguese draft notice, made inquiries at the American consulate and was told to return to this country if he did not wish to serve; he told the Portuguese military authorities that he was an American citizen and did not ask to serve in the Portuguese army; he was told that the only alternative to service was a concentration camp; as soon as released from the Portuguese army, he returned to this country as a stowaway. 161 F. 2d at 861. The trial court recognized his service as involuntary, but held against him on other grounds. 161 F. 2d at 862. In *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), Podea had applied to the American consulate for a passport, so that he could return to the United States and avoid drafted service in the Roumanian army, but he was erroneously refused the passport on the ground that he had already lost his nationality through his father's registration as a Roumanian; shortly before he was inducted, he again

applied for an American passport and was again erroneously refused; he was then conscripted and, as an incident thereof, took an oath of allegiance to Roumania; after release from service he made another unsuccessful effort to return to this country as an American and on a temporary visit here on a Roumanian passport was officially told to return and to try to enter as a permanent alien-immigrant; on his return to Roumania, he was again inducted into the army in 1941. In *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), Pandolfo told the Italian officer in charge of induction that he was an American and should not be obligated to serve in the Italian army; he had very limited schooling and lived at a distance from the nearest American consulate. 202 F. 2d 40.[24]

In *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.), the American consulate had erroneously refused Maenza a passport to return here, and the trial court believed his testimony "that he objected vigorously when he was originally conscripted, to the point of seeking to enlist the aid of American authorities and to the extent that force had to be used to remove him to his training camp". 202 F. 2d at 455, 458–9. In *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3), Lehmann visited the American consulate before his induction, and asked whether "there would be any way of getting to the United States, because I wanted to join the Air Force at that time", but was told that he could be given no

[24] It should be noted that the Second Circuit expressly stated that, if the trial court had found Pandolfo's service to have been voluntary, "we would not have reversed such finding as clearly erroneous." 202 F. 2d at 41, fn. 6.

assistance; he was also told that the Consulate could not help him to avoid service in the Swiss Army. 206 F. 2d at 595.[25] In *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2), involving the taking of an oath of allegiance as a conscript in Fascist Italy in 1936 or 1937, there was grave doubt that the plaintiff had taken the oath of allegiance in 1937 when he was of age; and it was significant that after living for many years in Italy he had been conscripted when he was only 20. See also our main brief in *Nishikawa*, at pp. 29–31, for a discussion of *Augello* and the Attorney General's opinion in the *Panzica* case, 41 Op. Atty. Gen. No. 16, on which *Augello* rests.[26]

In *Alata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.), Alata registered at the American consulate in 1928 and came again in 1929; prior to his induction into the Italian army in 1933, he was not informed by the Consulate that he should protest induction but was told that it was always possible to return to this country after his Italian military service. 221 F. 2d at 54–55. In *Soccodato* v. *Dulles*, 226 F. 2d 243

[25] *Perri* v. *Dulles*, 206 F. 2d 586, 589 (C. A. 3), concerned a man who was already serving in the Italian army (as a conscript) when Section 401 (c) became effective on January 13, 1941. The court held that his continued service was *prima facie* involuntary, "subject to rebuttal by evidence that on or after that date Italian law or military practice would have permitted the plaintiff to secure release, on the ground of his United States citizenship or otherwise". See also 230 F. 2d 259.

[26] *Monaco* v. *Dulles*, 210 F. 2d 760 (C. A. 2), does not involve duress at all, but only the proof of performance of the expatriating act itself; the court held that there was insufficient proof that Monaco had taken the Italian oath of allegiance asserted by the Government as the expatriating act.

(C. A. D. C.), the plaintiff's original taking of the oath of allegiance, in 1935, was while he was still a minor; admittedly, it did not expatriate him; he was recalled to service in 1940 (but did not take a new oath) and remained a soldier until 1946. But he became a prisoner of war early in February 1941, only a few weeks after Section 401 (e) became effective, and did not obtain release until March 1946. The court held that his "period of actual military service after the 1940 Act became effective was only a few weeks in 1941 and a few days in 1946. His failure in these two short intervals to seek release from the army did not cause a loss of citizenship." 226 F. 2d at 244–5.[27] *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), involved Section 401 (d), providing for expatriation by taking employment under a foreign state; economic duress was shown in testimony that he had to take the job in order to earn a livelihood—"dire economic plight and inability to obtain employment". 233 F. 2d at 554, 556.

---

[27] *De Marco* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), *Becce* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), and *Santi* v. *Dulles*, 226 F. 2d 266 (C. A. D. C.), were remanded on the authority of *Soccodato*. Similarly, *Brini* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.), made no definite finding on duress but remanded for consideration by the trial court under the criteria stated by the appellate court.

CONCLUSION

For the foregoing reasons, and those set forth in our main briefs in these cases, it is respectfully submitted that the judgments below should all be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
J. F. BISHOP,
ALBERT M. CHRISTOPHER,
Attorneys.

SEPTEMBER 1957.

FILED
MAR 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 44

CLEMENTE MARTINEZ PEREZ, *Petitioner*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

JOHN W. WILLIS
1735 DeSales St., N. W.
Washington, D. C.

VINCENT P. DIGIORGIO
THOMAS R. DAVIS
1021 Chester Ave.,
Bakersfield, California

Counsel for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Interest of This Amicus Curiae	1
Summary of Argument	2
Argument	3
I. Preamble	3
II. Introduction	5
III. If 401(j) is "merely" a congressional definition of one of the means of accomplishing voluntary expatriation, it is an unconstitutional conclusive presumption	7
A. Two preliminary considerations	7
1. The word "voluntary" in this context characterizes expatriation per se as being a matter of free choice. It does not mean merely that the particular act designated by Congress was done without coercion	7
2. The definition of expatriation as a freely chosen change of nationality is not inconsistent with the Savorgnan Rule that the statutory test is objective	8
B. If expatriation can only be accomplished by voluntary choice, then 401(j) can only be a statutory conclusive presumption, and as such it fails to meet the requirements of due process of law	9
IV. Congress is without power to impose compulsory loss of citizenship	13
A. The force and effect of Mackenzie v. Hare	13
B. The doctrine of inherent powers arising from sovereignty cannot sustain the challenged statute	19

Page

C. Congress derives no power from the Constitution to provide for compulsory expatriation 22

1. The significance of the lack of an express grant of power 22

2. The "necessary and proper" clause cannot sustain Section 401(j) 24

V. Section 401(j) is a penal provision and as such it is wholly lacking in the constitutional protections required in criminal proceedings 28

A. Is the statute penal in character? 28

B. The constitutional protections required in criminal proceedings are wholly lacking ... 30

VI. Compulsory expatriation is cruel and unusual punishment 30

Conclusion 32

Appendix A

AUTHORITIES CITED

CASES:

Cooper v. Slaughter, 50 So. 477 10
Doreau v. Marshall, 170 F. (2d) 721 7
Griffin, Ex parte, 237 Fed. 445 7
Heiner v. Donnan, 285 U.S. 312 11
Klapprott v. United States, 335 U.S. 601 ....27, 28, 30, 31
Mackenzie v. Hare, 239 U.S. 299 ..... 13-19, 21
Merryman, Ex parte, 17 Fed. Cas. 144 20
Milligan, Ex parte, 4 Wall. 2 20
Moody v. State, 17 S.W. (2d) 919 10
Okimura v. Acheson, 111 F. Supp. 803 12
Perez v. Brownell, 235 F. (2d) 364 14
Perkins v. Elg, 307 U.S. 325 7
Savorgnan v. United States, 338 U.S. 491 ..... 7, 8
Schlesinger v. Wisconsin, 270 U.S. 230 10
Thomas v. Collins, 323 U.S. 516 4

Page

Thornhill v. Alabama, 310 U.S. 88 4
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 19
United States v. Davis, 50 F. (2d) 903 10
United States v. McIntosh, 283 U.S. 605 20
United States v. Wong Kim Arc, 169 U.S. 649 ..... 14, 22
Waldron's Estate, In re, 267 Pac. 191 10

STATUTES AND CONSTITUTIONAL PROVISIONS:

Constitution, Article I, Section 8 22
Expatriation Act of 1954, c. 1256, 68 Stat. 1146, 8 U.S.C. § 1481(a)(9) 29, 30
Immigration and Nationality Act of 1907, 34 Stat. 1228 10
Nationality Act of 1940, Sec. 401(j), 54 Stat. 1168, 58 Stat. 748, 8 U.S.C. (1946 Ed.) § 801(j) 1, 2, 6, 7, 9, 10, 12, 13, 14, 19, 21, 24, 26, 28, 30, 32
8 U.S.C. § 800 (repealed) 7

TEXTBOOKS, ARTICLES, ETC.:

Hurst, Can Congress Take Away Citizenship? 29 Rocky Mt. L. Rev. 62 ..... 5, 6; App. A
Konvitz & Murphy, Essays in Political Theory, p. 132 23
Roche, The Loss of American Nationality, 99 U. Pa. L. Rev. 25 29
Wines, Punishment and Reformation 31
Developments in the Law—Immigration and Nationality, 66 Harv. L. Rev. 643 29
Note, "Voluntary": A Concept in Expatriation Law, 54 Col. L. Rev. 932 7
Note, The Expatriation Act of 1954, 64 Yale L. J. 1164 ..... 24, 26, 29, 30, 32
Anno., 86 A.L.R. 182 ..... 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 572

CLEMENTE MARTINEZ PEREZ, *Petitioner*

vs.

HERBERT BROWNELL, JR., Attorney General of the United States, *Respondent*

BRIEF OF AMICUS CURIAE

(Francisco Mendoza-Martinez)

INTEREST OF THIS AMICUS CURIAE

This amicus curiae is presently before this Court by virtue of a pending petition for certiorari in FRANCISCO MENDOZA-MARTINEZ, *Petitioner* v. ARGYLE F. MACKEY, *Commissioner of Immigration and Naturalization* and HERBERT BROWNELL, JR., *Attorney General of the United States, Respondents*, No. 623. Like the present petitioner, he raises as his sole issue the constitutionality of Section 401(j) of the Nationality Act

of 1940, a 1944 amendment. The factual situations, moreover, are substantially identical. It therefore seems clear that all of the rights of this amicus curiae will be determined in this proceeding rather than in his own.

SUMMARY OF ARGUMENT

The sole issue raised is whether Section 401(j) of the Nationality Act of 1940, a 1944 Amendment, is unconstitutional.

Viewed merely as a Congressional designation of a means of accomplishing voluntary expatriation, the statute must fall because it is an improper conclusive presumption. A legislature may make one fact conclusive evidence of another fact in controversy only if the first is the exact equivalent of the second. Draft evasion by means of departing the United States and voluntary relinquishment of nationality are not such equivalents.

If the statute is defended as a disciplinary measure which Congress was empowered to enact by virtue of the national sovereignty, it must fall for reasons just as compelling. The doctrine of sovereign powers is not only limited to external affairs; it is also limited to areas where the Constitution is silent. Section 401(j) is a punitive measure to facilitate enforcement of compulsory military service, which is obviously within the scope of the express power "to raise . . . armies." Moreover, there is no precedent for using compulsory expatriation as a *punishment* to implement sovereign power, as opposed merely to facilitating the separation of citizens from non-citizens.

Nor does Congress have any implied power to provide for compulsory expatriation arising from the

express constitutional grants to it. The only colorable argument which can be made in this regard is that Congress is empowered by the "necessary and proper" clause, as it is in the case of penal statutes generally. But the deprivation of a fundamental right, like freedom of speech or worship—or even a procedural right such as trial by jury, cannot be employed as a penal sanction, except as the restriction is an inherent result of imprisonment. Only certain of the *privileges* of citizenship, such as the right to vote or hold public office may be independently taken from the individual as criminal punishment. Citizenship, as the very keystone of all our fundamental rights, is therefore protected even against the broad license of the "necessary and proper" clause.

Moreover, even if it were found *generally* that Congress may provide for compulsory loss of citizenship, Section 401(j) provides for the imposition of criminal punishment without any of the protections guaranteed in criminal proceedings. The trier of fact is a Federal administrative agency. The rights of indictment by grand jury, trial by jury, privilege against self incrimination, as well as an obvious number of others are wholly lacking.

And beyond being penal in the modern sense, the challenged statute provides in reality for the primitive, outmoded punishment of banishment or ostracism. It therefore constitutes cruel and unusual punishment.

ARGUMENT

I. PREAMBLE

The petitioner in No. 623 (amicus curiae in this case) was born in the United States. He claims, therefore, to be an American citizen.

A federal administrative agency has decreed that he has forfeited his citizenship and that he is now an undesirable alien. It has ordered that he be permanently deported from the United States. This appeal challenges the constitutionality of the statute relied on by the agency.

It is not unreasonable to speculate that the determination of the instant question may be of considerable significance. There is ground for the conjecture that this Court may be moved to probe very deeply into the theory which underlies representative government. To ask whether Congress may abridge the right of citizenship is perhaps to ask what citizenship, within the democratic concept, really is.

In due course we shall deal as we are able with the formidable considerations present here, but at this point we have a more limited concern: *Whatever may be the final determination of the questions raised, it is respectfully urged that this Court has bound itself to approach them with the presumption that the challenged section is unconstitutional.*

Where fundamental liberties are sought to be abridged by legislative action, this Court has most vigorously insisted that the ordinary presumption of constitutionality must be reversed. (*Thornhill* v. *Alabama*, 310 U. S. 88, *Thomas* v. *Collins*, 323 U. S. 516.)

And basic as are those specially guarded liberties, they are rooted, in turn, in the right of citizenship itself. Such guarantees as freedom of speech and freedom of worship presuppose an equally protected right to remain on this soil in order to exercise them.

To hold otherwise would be to render vulnerable

to an attack by indirection the very privileges which have thus far been successfully defended against every direct assault:

> "One can hardly be said to be entitled to anything at the hands of a government if that government has the power to cast a person out . . . If the Congress can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of the ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores. For to take away a person's citizenship is to make him an alien, subject to deportation." ("Can Congress Take Away Citizenship?" Harold E. Hurst, 29 R. M. L. R. 62, 64).

It is not the present petitioner who should grasp the heavy oar here. Rather this Court should require that the Government establish, in the plainest kind of terms, that the challenged statute should be sustained.

II. INTRODUCTION

Proponents of the constitutionality of the statute challenged here, and its companion subsections, have relied in the past on two distinct and independent lines of argument:

> 1. It is true that Congress is vested only with the power to confer citizenship, not the power to take it away. Expatriation can only be accomplished by voluntary choice. But it is essential to the functioning of government that the status of persons within its borders be definitely ascertainable. Moreover, there is some doubt as to whether the right of expatriation may be exercised without the formal consent of the sovereign. Congress, therefore, may properly

designate those acts by which the citizen may make known his decision to relinquish his nationality and hence the acts which shall be sufficient to obtain the sovereign's consent.

2. Voluntary expatriation is only half of the story. Congress has more recently evidenced a proper concern with "the other half of the coin". Where the national interest requires it, Congress is authorized under the doctrine of implied powers or by virtue of the nation's sovereignty to provide for the compulsory loss of citizenship.

We shall deal with the foregoing propositions at length, but we anticipate proceeding further than their mere refutation. We propose to demonstrate additionally that Section 401(j) is in truth a penal provision and that the constitutional protections required in criminal proceedings were wholly absent here. Moreover, we expect to show that, beyond being punitive in the modern sense, the section provides in actuality for the outmoded, primitive punishment of banishment and hence that it constitutes cruel and unusual punishment. Professor Harold Hurst of the University of Denver has recently traversed the same ground with great skill. His article at 29 Rocky Mountain Law Review 62-81 is annexed hereto as Appendix "A".

III. IF 401(j) IS "MERELY" A CONGRESSIONAL DEFINITION OF ONE OF THE MEANS OF ACCOMPLISHING VOLUNTARY EXPATRIATION, IT IS AN UNCONSTITUTIONAL CONCLUSIVE PRESUMPTION

A. Two Preliminary Considerations

I. The word "voluntary" in this context characterizes expatriation per se as being a matter of free choice. It does not mean merely that the particular act designated by Congress was done without coercion.

It has been repeatedly held that expatriation is, by definition, the voluntary renunciation or abandonment of nationality and allegiance. (Ex Parte *Griffin*; 237 Fed. 445; *Dorean* v. *Marshall*, 170 F.(2d) 721; *Perkins* v. *Elg*, 307 U.S. 325; 8 U.S.C. 800 (Repealed) 13 Stat. 233). This apparently simple principle has, however, been frequently misapplied. The word "voluntary" has been understood to mean simply that the act relied on by the government must *be free from coercion*. This misconception has persistently appeared in connection with a line of cases arising out of World War II, which dealt with American citizens who were forced to join foreign armed forces or to vote in foreign elections against their will.

The courts have consistently held (without reaching the further question of constitutionality) that foreign military service or participation in foreign elections will not be grounds for expatriation if attributable to threat, legitimate fear, or even lesser pressures. (54 Columbia L. R. 932). But the concept of voluntary expatriation means far more than this. In *Savorgnan* v. *United States*, 338 U.S. 491, this Court quite recently said:

> "Traditionally the United States has supported the right of expatriation as a natural and inherent right of all people. Denial, restriction, impair-

ment, or question of that right was declared by Congress, in 1868, to be inconsistent with the fundamental principles of this government. From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation. However, due to the common-law prohibition of expatriation without the consent of the sovereign, our courts hesitated to recognize expatriation of our citizens, even by foreign naturalization, without the express consent of our government. *Congress finally gave its consent upon the specific terms stated in the Citizenship Act of 1907 and its successor, the Nationality Act of 1940. Those acts are to be read in the light of the declaration of policy favoring freedom of expatriation which stands unrepealed.*" (Italics ours)

Clearly, then, the word "voluntary" characterizes expatriation as a *freely-chosen change of status.* It is not merely a confirmation of the rather manifest proposition that an act which is alleged to have resulted in expatriation will be held not to have done so if it was performed at the point of a gun.

2. The definition of expatriation as a freely chosen change of nationality is not inconsistent with the Savorgnan Rule that the statutory test is objective.

In *Savorgnan* v. *United States*, supra, it was held that the statutory test determining whether expatriation had occurred was an objective one, that is to say the state of mind of the actor was immaterial. *This was no contradiction of the concept of expatriation by voluntary choice.* The petitioner had denounced her allegiance to the United States and sworn her allegiance to a foreign state. The act relied on by the government was clearly and unambiguously *an exact*

equivalent, indeed virtually a perfect definition, of voluntary expatriation. The Court very properly held that the petitioner could not be heard to claim a private intent to the contrary. She could no more have been allowed to disavow her expatriation than one can deliberately fire a revolver at the head of another and deny an intent to kill. The law must proceed on the assumption that we intend the natural and obviously inevitable consequences of our acts; the result otherwise would be chaos.

But what of the case where the act singled out by Congress is very far from being such a conclusive equivalent of voluntary expatriation? Suppose, for example, that the act were forgery of United States currency, or theft of goods in interstate commerce—or indeed suppose it were departing the country in wartime to avoid the draft. Would Congress still be engaged merely in designating the means of accomplishing voluntary expatriation?

B. If Expatriation Can Only be Accomplished by Voluntary Choice, Then 401(j) Can Only be a Statutory Conclusive Presumption, and as Such it Fails to Meet the Requirements of Due Process of Law.

Is 401(j) in reality an evidentiary presumption? Advocates of the theory now under discussion join with us in affirming that expatriation must be an exercise of voluntary choice. And since such acts as serving in a foreign army, voting in a foreign election, or seeking haven from the draft in a foreign country appear to be something less than dictionary definitions of voluntary relinquishment of citizenship, it is difficult to avoid concluding that Congress has designated certain acts which give rise to a *presumption* of such a voluntary relinquishment.

An examination of the earlier Immigration and Nationality Act of 1907 lends persuasive confirmation to this conclusion. The pertinent language reads, "Any person shall be *deemed* to have expatriated himself when . . ." (Italics ours). And the word "deemed" has long been established to be the exact equivalent of "presumed". (*United States* v. *Davis*, 50 F.(2d) 903, 904; *Cooper* v. *Slaughter*, 50 So. 477, 481; *In re Waldron's Estate*, 267 Pac. 191; *Moody* v. *State*, 17 S.W.(2d) 919, 920.) At an earlier date, then, Congress was candid in designating its enactment as a group of statutory presumptions.

The same language was not retained in the later statutes, including the one presently challenged. But a mere change in language will not change a presumption into something else, if such it remains in practical effect. This Court has plainly so announced in *Schlesinger* v. *Wisconsin*, 270 U. S. 230.

Moreover, we have also seen in the *Savorgnan* case that the doing of the overt act is enough; it may not be rebutted by a showing of a subjective lack of intent. Clearly, then, Section 401(j) is not merely a prima facie presumption; it is a conclusive one.

In short, the act of departing or remaining outside of the United States for the purpose of draft evasion gives rise, under the challenged section, to a conclusive presumption of a voluntary relinquishment of nationality.

The question, then, is by what criterion this presumption shall be tested to determine whether it satisfies the requirements of due process of law. One writer has framed the pertinent rule this way:

> "The general proposition is supported by many cases that a legislature cannot constitutionally

make one fact conclusive evidence of another material fact in controversy if the former is not, in and of itself, conclusive." (86 ALR 182)

In thus framing the rule the writer relied principally on the case of *Heiner* v. *Donnan*, 285 U. S. 312, 328-329, in which the Court held in part as follows:

> "The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof; (citations) and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one it is open to challenge and disproof, and in the other, conclusive. However, whether the later presumption be treated as a rule of evidence or of substantive law, *it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality*, and the result is the same, unless we are ready to overrule the Schlesinger case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. *This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.* (Citation). 'It is apparent,' this court said in the Bailey case (page 239), 'that a constitutional prohibition can-

> not be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.'" (Emphasis ours).

In the case just quoted, this Court struck down "an attempt by legislative fiat to enact into existence a fact which does not and cannot be made to exist in actuality". Here was vindication for the protest of Chief Judge McLaughlin of the District Court of Hawaii, in attacking another subsection, that "the right of expatriation is not to be converted into a liability by *Congressional fiat.*" *Okimura* v. *Acheson*, 111 F. Supp. 803.

The remaining question, then, is whether Congress has thus violated due process here. *In other words, is the act of departing the country in wartime to avoid military service the conclusive equivalent of a voluntary relinquishment of nationality?*

Surely this point need not be belabored. Congress has imposed expatriation under this subsection only when a boundary of the United States is crossed, yet it would seem obvious that the choice of the Kentucky Hills or the Republic of Mexico as a refuge is an accident of geographical location, not differing purpose. And more broadly, we know by common experience (or by common sense) that while the moving cause of draft evasion may be fear, avarice, or even unadorned ignorance, it is very rarely indeed a desire to renounce one's nationality.

401(j) was a wartime measure, passed in 1944 as the Allied military effort approached its climax. It was intended to facilitate the work of selective service

officials by imposing a drastic penalty on those who removed themselves beyond their territorial jurisdiction. It was a punitive, disciplinary imposition of compulsory loss of citizenship, and it was nothing else. To call the act of leaving the country while committing the Federal felony of draft evasion an exercise of the right of voluntary expatriation is not only double talk—it is a particular kind of double talk which this Court has expressly called unconstitutional. Tested in terms of the first line of argument, Section 401(j) fails to meet the Fifth Amendment requirement of due process of law.

IV. CONGRESS IS WITHOUT POWER TO IMPOSE COMPULSORY LOSS OF CITIZENSHIP

A. The Force and Effect of Mackenzie v. Hare.

Able counsel for the government have not been unaware of the vulnerability of the argument just discussed. In anticipation of its disintegration, they have forthrightly taken the stand in recent cases that voluntary expatriation is wholly *irrelevant* in testing the constitutionality of Section 401(j), because the section is frankly a punitive, disciplinary measure which Congress is empowered to impose in the national interest under the doctrine of sovereign and implied powers. The contention is an honest one, and it stakes out a field of combat which is much more suitable for the determination of this controversy.

But if it were not for some language in a Supreme Court decision of 1915, this latter-day position would be a very lonely one. It was earlier asserted very vigorously by this tribunal that Congress has only the power to confer citizenship, not the power to take it away (*United States* v. *Wong Kim Ark*, 169 U. S.

649). And expatriation was otherwise treated solely as a matter of voluntary choice throughout the judicial history of this Court.

The decision from which government counsel derive comfort, of course, is *Mackenzie* v. *Hare*, 239 U. S. 299. And we would be ill-advised to treat lightly the question of the propriety of this reliance. The learned Circuit Court of Appeals for the Ninth Circuit in the case now before the Court depended entirely upon the decision, without any further analysis, in holding Section 401(j) constitutional. (*Perez* v. *Brownell*, 235 F.(2d) 364, cert. granted 352 U. S. 908). Yet we persist in our confidence that the *Mackenzie* case can be shown to be consistent with the view we assert here. Indeed we contend that it furnishes us with substantial affirmative support.

In the discussion just concluded it was conceded that Congress may, for purposes of achieving certainty and of defining the means of obtaining the sovereign's consent, designate certain acts which objectively constitute expatriation, if the acts are clearly and unambiguously the conclusive equivalents of the voluntary relinquishment of nationality. *The pivotal fact in Mackenzie* v. *Hare is that the act designated by Congress was, in 1915, exactly such a conclusive equivalent.*

The statute in question provided that "any American woman who marries a foreigner shall take the nationality of her husband." In 1915 the social revolution often designated as "The Emancipation of Women" was far from completed. Passage of the Nineteenth Amendment was five years in the future. When a woman married, her legal identity still merged

for most purposes with that of her husband. "The identity of husband and wife is an ancient principle of our jurisprudence," wrote the *Mackenzie* Court. "It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it, but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband."

Logically, if an American woman merged her identity with a foreigner by marrying him, she became a foreigner.

And still apprehensive that it might be understood to be departing materially from the concept of voluntary expatriation, the Court painstakingly disavowed any such intention. After summarizing with considerable care the authorities cited by the plaintiff in this connection, the Court said, "There need be no dissent from the cases cited by plaintiff; there need be no assertion of a very extensive power over the right of citizenship or of the imperative imposition of conditions upon it."

If there had been no more than this, the case would be wholly and completely consonant with the traditional concept of expatriation by voluntary choice. Congress, having provided for expatriation by means of one of its unambiguous and exact equivalents, would have been properly sustained on that ground alone.

But of course, there *was* more than this. After reaching conclusions which would have completely satisfied a later, *Savorgnan* tribunal, the 1915 Court,

went on to add the language which has been the principal (if not the only) judicial justification of consequence for the development of the concept of involuntary or compulsory loss of nationality:

> "Plaintiff . . . bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers . . . there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. . . . This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, may be, into controversies. . . ." (239 U.S. 311-312).

The next inquiry must inevitably be why the Court felt impelled to embark on this expedition, when there was apparently ample support for its holding in traditional authority.

The answer may be a matter of chronology. Until this moment in 1915, virtually the entire body of appellate opinion had dealt with expatriation as ex-

clusively a matter of voluntary choice. Now suddenly the question was raised, apparently for the first time, as to whether the allegedly expatriated citizen could protest that although the act in question was admittedly done, there was no actual, subjective intent to relinquish citizenship. In view of the traditional treatment of expatriation as a matter of voluntary choice, it is hardly surprising that the Court did not immediately leap to embrace the objective test for expatriation. Understandably, it sustained the plaintiff in her contention that expatriation under the challenged statute was compulsory in character:

> "It will thus be seen that plaintiff's contention is in exact antagonism to the statute. Only voluntary expatriation, as she defines it, can divest a woman of her citizenship, she declares; the statute provides that, by marriage with a foreigner, she takes his nationality."

But viewed in the perspective of the *Savorgnan* case which was to follow thirty-five years later, "plaintiff's contention" was not at all "in exact antagonism to the statute". If marriage to a foreigner was one of the *conclusive equivalents of expatriation*, then such a marriage properly should be held to have resulted in expatriation regardless of any contrary secret intent on the part of the citizen. If *Mackenzie* v. *Hare* had been heard in 1950, the Court would have held that "plaintiff's contention" as to the lack of subjective intent was not "in exact antagonism to the statute" ***but rather was simply irrelevant.***

Mackenzie v. *Hare*, however, was heard in 1915, not 1950; and the Court was much impressed with the plaintiff's contention that the statute was indeed a departure from the concept of expatriation as a freely

chosen right. It therefore concerned itself with the question of whether the sovereign's conduct of foreign relations did not invest it with an inherent power to provide for expatriation.

In short, the lack of the Savorgnan rule in its arsenal reasonably explains the decision of the Mackenzie Court to venture into the field of compulsory expatriation. Viewed in the light of the *Savorgnan* case, the excursion now has only the force of *obiter dictum*. In terms of present law, the Court said all it needed to say when it affirmed that marriage to a foreigner was the equivalent of a voluntary relinquishment of citizenship.

And finally the *Mackenzie* rule must be very drastically limited in scope, even if we accord it all possible force. We have seen that the Court expressly disavowed any intent to depart from the traditional concept of expatriation by voluntary choice, but that it pointed to the absolute necessity that the sovereign be unimpeded in its conduct of relations with other powers. "This is no arbitrary exercise of government", said the Court. "It is one which, *regarding the international aspects*, judicial opinion has taken for granted would not only be valid, but demanded." The Court was thus at pains to avoid any suggestion that the principle could be extended to the nation's *internal* affairs. Moreover, the problem which was found to invoke the inherent powers of the sovereign was the *change of allegiance from one country to another*. Nowhere does the Court even remotely suggest that the demands of the sovereign's conduct of foreign relations could justify the use of compulsory loss of citizenship as a *criminal punishment*.

There need be no challenge of *Mackenzie* v. *Hare* on behalf of the present petitioner. Far from being *stare decisis*, it serves to bring the vice of the statute challenged here into sharper focus.

B. The Doctrine of Inherent Powers Arising From Sovereignty Cannot Sustain the Challenged Statute.

The holding (or speculation) of the *Mackenzie* Court just discussed was expressed in more concrete terms in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, as follows:

> "It will contribute to the elucidation of the question if we first consider the difference between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic affairs. That there are differences between them and that these differences are fundamental, may not be doubted.
>
> "The two classes of powers are different both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." (299 U.S. 315-316).

Is this language sufficient to sustain Section 401(i)?

Plainly the statute was enacted to facilitate the enforcement of the Selective Service Act. Plainly the statute was concerned with the "waging of war". In the *Curtiss-Wright* case, Mr. Justice Sutherland asserted that the power to wage war was, like the peaceful conduct of foreign relations, an inherent power of the sovereign. Should we then conclude

that the Section is "necessary and proper" to implement an inherent power of the sovereign, rather than a constitutional power delegated to the Federal Government?

To argue thus is to contend that all things done by the Federal Government in the name of national defense are immune from constitutional limitations. It is to deny the validity of the historic pronouncement of Mr. Justice Taney:

> "*Nor can any argument be drawn from the nature of sovereignty, or the necessity of government for self-defense in time of tumult and danger.* The Government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted." (Ex Parte Merryman, 17 Fed. Cas. 144)

Moreover, the source of Federal power to provide for compulsory military service has never been held to arise out of inherent powers of the sovereign. Rather it has been expressly held to derive from the express power granted by the Constitution "to raise . . . armies". (*United States* v. *McIntosh*, 283 U. S. 605; *Ex Parte Milligan*, 4 Wall. 2; concurring opinion of Mr. Justice Chase.)

Of what use are all of the war powers granted by the Constitution if the Government already had them in the first place? These same war powers were surrendered to the Federal Government by the States and by the people only after prolonged hesitation, bitter debate, and sober contemplation. No other problem

was more prominent in the minds of our framers than this. Do we say now that they were really concerned about nothing at all?

Surely the proper rule is that the doctrine of sovereign powers should be invoked (if it should be invoked at all) only where the Constitution is silent. In the present instance, the Constitution has expressly provided for the power "to raise . . . armies". Either section 401(j) is "necessary and proper" to the implementation of this power or it is not.

But does the Government contend that we have too narrowly construed its position here? Is it contended that the power to provide for compulsory loss of citizenship is a plenary power of the sovereign *per se*, beyond and above the power to conduct foreign relations or to wage war, and above and beyond the strictures of the Constitution? This would seem to be the trend of some recent Government briefs.

Suffice it to say that there exists no shred of authority to sustain this frightening proposition. *Mackenzie* v. *Hare* is the highwater mark of compulsory expatriation, and the very most that can be attributed to the *Mackenzie* Court is the proposition that where change of citizenship from one nationality to another impinges upon the sovereign's conduct of foreign relations, the sovereign may resolve the conflict by providing a statutory means for distinguishing citizens from non-citizens. Nowhere is there the barest hint that the power to take away citizenship is *per se* a plenary power of the sovereign.

C. Congress Derives No Power From the Constitution to Provide for Compulsory Expatriation.

1. The significance of the lack of an express grant of power.

It would seem apparent that if the framers had an overriding purpose in the omission of an express power to take away citizenship, there can be no *implied* power to do so. Citizenship by birth is conferred by the Fourteenth Amendment. And while Congress is empowered to confer citizenship by naturalization (Article I, Section 8) nowhere is it empowered to take it away. (*United States* v. *Wong Kim Ark*, 169 U. S. 649) The citizen, moreover, may be deprived of life, liberty and property as long as it is done by due process of law, but the Constitution grants no such power over citizenship — with due process or without.

Is there a significance to this silence? Can it be argued that citizenship is but a lesser component of life and liberty and hence need not have been expressly designated? It may be that the answer can be found by inquiring what citizenship, American Citizenship, really is.

We have already said, by way of preamble, that citizenship is the most basic of all our rights simply because it is the source of our right to be here, our right to remain here. Looking outward through the eyes of the individual, this is, no doubt its most valuable attribute. Without it, certainly, the other great guaranties of the Constitution mean little indeed.

But citizenship is also of crucial importance in another and quite different respect. *Citizenship as a*

status is an indispensable component of the democratic structure:

> "The individualist idea underlies all the better known conceptions of the French Revolution. Liberty is the liberty of the individual, equality the equality of individuals in the possession of legal rights, fraternity a free, voluntary, and enthusiastic coalescence of individuals into a body politic. The 'nation' in Revolutionary parlance is the result of this free coalescence. It is not a *Volk* bound together by community of physical race or historic culture, into which persons are born by a destiny apart from their own will. *It is a body made up of individuals in their capacity as citizens; it is presumed to exist by voluntary participation in a kind of contract; and what the members have in common is not race, language, or history, but law and rights. The nation, thus defined, is sovereign, but the individual members are not subjects. They are 'citizens' still in possession of their individual liberty; and the idea of citizenship, in which a new and wider liberty were asserted together, was probably the profoundest idea of the French Revolution . . .*" (Essays in Political Theory, Konvitz & Murphy, by R. R. Palmer, page 132). (Emphasis ours)

Citizenship, then, is a recognition of the individual as the all-important entity. *It is the source from which the Individual derives his capacity to contract with Authority for the formation of democratic government.* Even the great freedoms of the First Amendment, ultimate citadels though they seem to be, are but terms and conditions of the contract. Without the status of citizenship, there cannot even *be* a contract.

Here is justification for concluding that the framers designedly withheld the power to abridge citizenship. Well may the framers have concluded that the status of citizenship must be indestructible. It is *life and liberty* which are the lesser components. Life inevitably must end, and liberty, be it ever so magnificent, is but a clause in the contract. *It was the idea of individuality which put an end to tyranny. And citizenship is the most basic expression of individuality.*

We have spoken in the past tense, for our thoughts were of the framers. But in our own time new tyrannies have arisen, and they have had a common denominator: They have evidenced a savage hatred for this same concept of man as an individual, knowing it well to be their mortal enemy. We submit that there was purpose, compelling purpose, in the omission of any express grant of power over citizenship.

2. The "necessary and proper" clause cannot sustain Section 401(j).

It is not seriously argued that the War Powers carry with them any general implied power to provide for loss of nationality. There appears no reason why such a power should be uniquely a requirement of National defense. A cogent argument, however, can be advanced that the power exists by virtue of the "necessary and proper" clause; it has been well stated by a writer otherwise very critical of compulsory deprivation of citizenship:

> "The Constitutional power question posed by the Expatriation Act is whether Congress has power, under the 'necessary and proper' clause, to impose denationalization as a sanction to en-

force a criminal statute enacted pursuant to a granted power. For the Constitution grants no explicit power to define and punish any crimes except treason, crimes against the law of nations, and several crimes of relatively rare occurrence. Nearly all Federal criminal statutes stem from the power to enact legislation which is 'necessary and proper' to carry out the expressly granted powers into execution. Neither does the Constitution grant any express power to impose fines, imprisonment or any other particular type of punishment; these powers are implied as well. And since the decision in *McCullough* v. *Maryland*, the 'necessary and proper' clause has been interpreted as a grant of power rather than a limitation upon power. The Supreme Court has never interpreted this clause to authorize review of the discretion of Congress in choosing the means by which to carry into execution the powers conferred by the Constitution. The Constitutional phrase 'necessary and proper' means 'necessary' only in a sense that a reasonable legislator might consider the means chosen necessary to implement a granted power, and 'proper' in the sense that no specific prohibition is violated.

"Even if the 'voluntary' rationale is disregarded, as seems both likely and desirable, it nevertheless seems certain that under present case law the 'lack of power' argument is doomed to failure. The expatriation act is clearly a 'necessary' means of enforcing the statutes against treason, rebellion and subversion since it will tend to deter violation of these statutes. And the question whether it is 'proper' legislation seems foreclosed by the decision in *Dennis* v. *U. S.*, which held that the Smith Act was a legitimate exercise of Federal Government's power of self-protection. Unless the Supreme Court is willing to find in the 'necessary and proper' clause a new

limitation on Congressional power, arguments against the necessity and propriety of penal expatriation must be directed not to the courts but to the Congress. The constitutionality of the Expatriation Act would appear to depend ultimately upon whether use of denationalization as a punishment for crime violates explicit Constitutional limitations on Congressional power." (64 Yale Law Journal 1464).

The same writer has vigorously challenged the constitutionality of Section 401(j) on two other grounds (pg. 1182, note 98, pg. 1196 et seq., Id.), so we must be given pause by his comments in this regard.

But he has passed by the most basic vice of the statute: Rights which are fundamental to this nation's form of government may not be indirectly subverted by making the denial of them a form of criminal punishment.

Some hypothetical enactments may bring the issue into focus. How would we regard a statute which provided that any draft evader who departed the United States would thenceforth be denied the right to worship in any public church or synagogue—or perhaps only in such churches and synagogues as the Secretary of State might designate? What would we say of a statute which forbade a convicted draft evader to participate in any political discussion, or to join in any assembly composed of more than five persons? Or what of a statute forbidding such a draft evader from thereafter printing, or causing to be printed, for distribution to any other person or persons, any expression of thought, idea, or opinion? And let us consider a "lesser" invasion—consider a statute providing that a convicted draft evader would

never thereafter be entitled to a trial by jury if any criminal proceedings were later brought against him!

The fundamental liberties are curtailed, of course, by penal incarceration, and are ended permanently by execution. But these are inevitable concomitants of the punishment itself. We speak here of the use of the deprivation of basic rights as an *independent penal sanction.*

But what of the civil disability statutes operative in many of the states? These statutes deal in reality with the *privileges* of citizenship; they forbid, for example, the former convict to sit upon a jury, to vote in any election, to hold public office, to engage in certain kinds of employment. *But unanimously they refrain from denying to the former convict his freedom of speech, religion, press and assembly—or even such procedural protections in criminal proceedings as the right of trial by jury or the privilege against self-incrimination. We find no authority whatever for using the deprivation of a fundamental protective right as a criminal punishment.*

What then of citizenship? What then of "this most comprehensive and basic right of all?" (*Klapprott v. United States*, 335 U.S. 601, 616). Is it any less a fundamental protective right?

We have seen that even the fundamental liberties are grounded in turn in citizenship, for such guaranties are idle unless there is presupposed the right to be here to exercise them. *If abridgment of fundamental liberties per se may never be used as a penal sanction because of their paramount role in a democratic society, a fortiori is this true of the more basic right of citizenship. The "necessary and proper" clause, broad*

though its scope may be, cannot transcend this principle.

V. SECTION 401(j) IS A PENAL PROVISION AND AS SUCH IT IS WHOLLY LACKING IN THE CONSTITUTIONAL PROTECTIONS REQUIRED IN CRIMINAL PROCEEDINGS.

A. Is the Statute Penal in Character?

It is difficult to know, at this late date, how extensively the present subject should be pursued. Both courts and writers now seem agreed that, whatever may be said of the power of Congress to provide for compulsory expatriation, Section 401(j) and a number of its companions are plainly punitive and penal in character. And now it seems generally understood that denaturalization proceedings and the deportation of aliens are clearly distinguishable from the present problem. To take from a native American the citizenship which is his constitutional birthright and to banish him forever to some far corner of the earth is so plainly a punitive sanction of the harshest kind that one feels apologetic in belaboring the point. In arguments below, however, this was never conceded by the Government. It would therefore seem necessary to marshal some of the authorities here.

In protesting once more that the deprivation of citizenship, even in denaturalization cases, is penal in character Mr. Justice Rutledge said:

> "Yet by the device or label of a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.
>
> "*No such procedures could strip a natural born citizen of his birthright or lay him open to such a penalty.*" (*Klapprott* v. *U.S.*, 335 U.S. 601, 616).

At 66 Harvard Law Review 643, 735, the writer concludes:

> "The entire policy of using expatriation as a means of criminal punishment, particularly where statelessness results, should be reconsidered . . . it seems clear that the loss of nationality because of treason, desertion, or draft avoidance should not be regarded as the voluntary choice of the individual, but rather as a penalty imposed by the Government."

At 64 Yale Law Journal 1164, 1180:

> "It seems certain that expatriation as imposed by the Act of 1954 is 'punishment' within the constitutional definition of that term. The distinction between punishment, in the constitutional sense, and non-penal civil deprivations has never been made entirely clear by the courts. Several commentators have suggested, however, that the crucial element is penal intent on the part of Congress. Probably the severity of the deprivation is also relevant in determining this question. By both criteria the expatriation act is penal. The debates on the act indicate that the functions of denationalization were to be those usually associated with criminal sanctions: deterrents and punishment."

And at 99 U. of Penna. Law Review 25, 70:

> "The present tendency toward using denationalization as a penalty should be discarded. At the moment loss of citizenship is a supplemental penalty for desertion, treason, and leaving the United States to avoid conscription. Presumably, the intention of the lawmakers was to deprive those convicted of the above crimes of their civil rights. But as the law now reads, treason, desertion, and leaving the country to avoid military

service are listed as criteria for the determination of when an American has voluntarily expatriated himself."

B. The Constitutional Protections Required in Criminal Proceedings Are Wholly Lacking.

To argue that the express constitutional power to raise armies implies a necessary and proper power to use compulsory loss of citizenship as a penal sanction to punish draft evasion is to admit that the compulsory deprivation of citizenship is in truth a criminal proceeding. Section 401(j), unlike its 1954 successor, required no criminal conviction. The trier of fact was therefore a Federal administrative agency. It scarcely seems necessary to belabor the fact that the section is wholly lacking in the necessary safeguards in criminal proceedings such as presentment by grand jury, trial by jury, the privilege against self-incrimination. (64 Yale L. J. 1182)

VI. COMPULSORY EXPATRIATION IS CRUEL AND UNUSUAL PUNISHMENT

Section 401(j) provides for the permanent loss of citizenship and hence the assumption of alien status. No authorities need be cited at this late date to establish the absolute authority of the Government to provide for the deportation of aliens. The challenged statute is therefore nothing more or less than a provision for banishment or ostracism, a primitive criminal sanction which has long since (or so it had been thought) disappeared from Western civilization:

> "To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights in almost all others. *To lay upon the citizen the punishment of exile . . . is a penalty thus far un-*

known to our law and at most doubtfully within Congress' power." (*Klapprott* v. *U.S.*, 335 U.S. 601, 616) (Italics ours).

The following text material is illuminating:

"It remains only to mention exile, which is essentially an alternative for the death sentence, and has the same effect, so far as the community which desires to rid itself of a culprit is in question. Banishment may, however, be temporary or for life. It may also be compulsory, or by legal fiction, it may be voluntary, the criminal being liable to execution if he remains at home. It was by this subterfuge that transportation was instituted, as we shall see in a subsequent chapter. Transportation always involves the dilemma that the persons exiled are either good or bad citizens; if good, they are a loss to their native country; but if bad, that country has no right to impose the burden of their presence upon an unwilling community. Every community is unwilling which has reached a stage of development at which it is self-sustaining without convict labor. The Romans divided banishment into deportation and relegation; deportation was exile to a place specified, from which the banished were not allowed to depart; but relegation was simple exile, and did not involve loss of citizenship. A form of banishment called ostracism . . . existed at Athens . . . it was inflicted by popular suffrage at a special election . . . Ostracism did not involve the confiscation of the exile's estate, as the ordinary form of banishment did . . . *the mind dislikes to dwell upon acts of violence, such as have been described in this dark chapter of human nature at its worst.*" "Punishment and Reformation", Frederick Howard Wines, Chapter V (Intimidation and Torture) pages 85 and 86. (Italics ours)

There is much more to be said on this subject in more specific terms. What needs to be said, however, has already been committed to paper with a thoroughness and precision which paraphrasing could only weaken. Particular attention is respectfully invited to 64 Yale Law Journal 1164, 1187-1194.

CONCLUSION

Section 401(j) of the Immigration and Nationality Act of 1940 is an attack of very serious proportions on vital constitutional safeguards. It is urged that the section be declared unconstitutional on its face, that the petitioner be declared a citizen of the United States, and that any and all orders heretofore made or issued by any person whomsoever providing for his deportation be declared null and void.

Respectfully submitted,

DI GIORGIO AND DAVIS
By THOMAS R. DAVIS

FISCHER, WILLIS AND PANZER
By JOHN W. WILLIS

APPENDIX A

CAN CONGRESS TAKE AWAY CITIZENSHIP?

HAROLD E. HURST*

(29 Rocky Mountain Law Review 62)

> The most difficult character in comedy is that of a fool, and he must be no simpleton who plays the part.—Don Quixote.

It has been written that ". . . the power to provide for loss of citizenship is an inherent attribute of Congress, vital to maintaining the sovereignty of the United States in the area of foreign relations—and to argue otherwise would really be windmill tilting. . . ."[1] The statement depended for authority upon its own assertion.

Now if a windmill be real, and its only function is to serve man, there would, of course, be no purpose in couching the lance and rushing madly at the device. But if, as Don Quixote imagined his windmill to be, the contraption is really a tyrant bent upon robbing man of personal liberty and disguised as a windmill only for the purpose of deception, then failure to attack may well result in the loss of all those liberties which Americans have been most vigilant to protect. Both philosophically and legally there is good cause to war against any power claimed for the Congress to take away citizenship, for if citizenship be lost, all is lost.

I. THE VALUE OF CITIZENSHIP

Before examining the question of Congressional power, it may be well to reflect upon the nature of citizenship—not citizenship in general, but citizenship in the United States. Americans are inclined to think about their privileges

---

* Professor of Law, University of Denver.

[1] Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 27 (1950).

and immunities in specific terms. They desperately defend their freedom of speech, press, assembly and religion. They claim the right to a fair and open trial. They assume it is their right as Americans to live under the protection of equal laws. Neither slavery nor involuntary servitude can exist in America. Freedom to travel from place to place within the country, freedom from arbitrary arrest, participation in the law making process—all those rights which spring from constitutional guarantees are likely to be listed by any citizen as the specific benefits of citizenship.

However, the Constitution speaks more often of persons than of citizens. Many of the great guarantees of personal liberty are the result of constitutional limitations which make it impossible for the government to enact or enforce any law which would abridge the liberties of any person. The right of a person to speak his mind or to worship as he pleases is not his because he is a citizen. He enjoys such rights because he is here and the Constitution forbids any agent of government to interfere with them.[2] The right to a fair trial and to the protection of equal laws may be claimed by the alien within our borders as well as by the citizen.[3] Habeas corpus is available to citizen and alien alike.[4] The point, established by many decisions, need not be labored here. It is clear that the enjoyment of practically all of the rights which a person might think of as possessed by citizens and as contributing to

[2] Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Douglas v. City of Jeanette, 130 F.2d 652 (3d Cir. 1942), *aff'd*. 319 U.S. 157 (1943).

[3] Truax v. Raich, 239 U.S. 33 (1915).

[4] For cases in which habeas corpus has been employed as the instrument for testing validity of detention of aliens, see United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Kwong Hai Chew v. Colding, 244 U.S. 590 (1953); Yamataya v. Fisher, 189 U.S. 86 (1903).

the value of citizenship depend upon something *other* than the mere fact that a person is a citizen.[5]

The alternative to citizenship is alienage.[6] Perhaps the value of citizenship can best be brought into focus by looking to the status of the alien. The alien within our borders enjoys the same fundamental protections as the citizen and while within our borders owes temporary allegiance to the United States. It was long ago declared, in discussing the status of the alien within our borders, that:

> While he lawfully remains here, he is entitled to the benefits of the guaranties of life, liberty and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land, as if he were a native or naturalized citizen of the United States.[7]

---

[5] The author is not unaware of such pronouncements in different contexts as: "The right to peaceably assemble and petition for redress of grievances, the privilege of writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States. . . ." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872). It may also be admitted that certain privileges such as the suffrage and qualification for public office may be extended to citizens to the exclusion of aliens. But these privileges are not universal for all citizens and do not depend upon citizenship for their enjoyment. Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952).

[6] There is also the status of "national", recognized and created by the Congress. The national has some of the disabilities of the alien and some of the privileges of the citizen. See McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 CALIF. L. REV. 593 (1934).

[7] Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

The major difference, then, between citizen and alien appears in all its stark reality when the nation withdraws its hospitality and requests the alien to withdraw or be cast out. It is the right to be here; to stay in the United States, a country where constitutional limitations make a person free from the oppressive hand of an arbitrary and tyrannical government, that gives United States citizenship its real and abiding value. This right to belong, this right to stay, connotes a permanent membership in a state composed of free people. As it was put by Chief Justice Waite:

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.[8]

One can hardly be said to be entitled to anything at the hands of a government if that government has the power to cast a person out. That the nation has such power over *aliens* is now beyond question. "The Government's power to terminate its hospitality (to aliens) has been asserted and sustained by this Court since the question first arose."[9] It follows then, that if the Congress

---

[8] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165 (1874). *Cf.* United States v. Minker, 350 U.S. 179 (1956); Schneiderman v. United States, 320 U.S. 118, 120 (1943); United States v. Cruikshank, 92 U.S. 542, 549 (1875); Dred Scott v. Sanford, 59 U.S. (19 How.) 393 (1856); Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849).

[9] Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952). *Accord*, Carlson v. Landon, 342 U.S. 524, 534 (1952); Yamataya v. Fisher, 189 U.S. 86, 97 (1903); Fok Yung Yo v. United States, 185 U.S. 296, 302 (1902); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). The source of the nation's power to exclude and deport aliens in the foregoing cases was ". . . the sovereign right to determine what non-citizens shall be permitted to remain within our borders." Carlson v. Landon, *supra* at 534. The power had previously been found in the power of Congress to regulate foreign commerce. Chinese Exclusion Cases, 130 U.S. 581 (1889).

can take away citizenship, all the rights which the citizen so firmly believes to be unalienable may vanish over the horizon, out of sight and reach of the ship which bears him into exile or returns him to some land from whose horrors and tortures he or his ancestors fled to our shores.[10] For to take away a person's citizenship is to make him an alien, subject to deportation.

II. The History of Statutory Deprivation of Citizenship

The question of Congressional power to deprive a person of his citizenship has not always been with us. It seems desirable at this point to trace, very briefly, the development of the relatively modern statutes imposing involuntary loss of citizenship upon various classes of persons. This history has been amply presented by others[11] and only enough need to be set out here to define our problem.

The first attention given by Congress to the matter of loss of citizenship was its statutory recognition of the right of any person to renounce his allegiance.[12] By that statute, the Congress announced this nation's policy that each individual had the "natural and inherent" right to effect voluntary expatriation from the country of his allegiance. Beyond its recognition of the right in the individual person to give up his citizenship and acquire that of another country, Congress left the matter of loss of citizenship unregulated until 1907.

---

[10] For a brief discussion of the international problems and the condition of the stateless person, see Comment, 30 Am. J. of Int. Law 495 (1936). For a vivid example of the hopelessness of a man without a country, see Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

[11] *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643 (1953); Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25 (1950).

[12] Act of July 27, 1868, c. 249, § 1, 15 Stat. 223.

By the Act of March 2, 1907,[13] an American citizen was "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." The act also provided that ". . . any American woman who marries a foreigner shall take the nationality of her husband." Another provision declared that if a naturalized citizen returned to the country of his former allegiance and lived there for two years, he was presumed to have expatriated himself. These provisions were interpreted in different ways at different periods of time by both the executive departments and the courts. The provision concerning women marrying foreigners was the only one, by its language resulting in automatic loss of citizenship from performance of the specified act. Hopeless confusion resulted from use of such terms as "deemed" and "presumed" in other sections of the statute.[14] As might be expected, such terms were usually interpreted to create something in the nature of a prima facie case of expatriation from performance of the act. This is not the place to report the details of interpretation. The significant matter here is that in the 1907 legislation, which prevailed for the most part until 1940, Congress did not seem disposed, except in the case of women marrying foreigners,[15] to provide for automatic loss of citizenship.

Comprehensive legislation in 1940,[16] codifying and revising all the laws relating to naturalization and loss of citizenship and calculated to provide more readily applicable objective standards for determining who should

---

[13] c. 2534, 34 STAT. 1228 (repealed by 54 STAT. 1172 (1940)).

[14] For an adequate analysis of the various interpretations placed upon these terms, see Roche, *supra* note 11.

[15] The Cable Act, c. 411, § 3, 42 STAT. 1022 (1922), eliminated this provision.

[16] 54 STAT. 1137 (1940), as amended, 8 U.S.C. §§ 1401-1503 (1952).

be separated from the body politic, provides: ". . . a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . ." obtaining naturalization in another country upon an application filed by himself, a parent, guardian, or agent, or through the naturalization of a parent; taking an oath of allegiance to a foreign state; entering or serving in the armed forces of a foreign state; accepting any office or employment under a foreign government if he has or acquires the nationality of such government; accepting any office or employment under a foreign government for which office an oath of allegiance is required; voting in a foreign political election; making a formal renunciation of nationality before an official; making in the United States a formal written renunciation; deserting the military forces of the United States in time of war; committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States; and departing or remaining outside the United States in time of war for the purpose of evading or avoiding training and service in the armed forces. Other parts of the statute provide for loss of citizenship by dual nationals or by naturalized citizens who are abroad or who go abroad, except for certain specified reasons, and do not return within a period of a few years, the length of time varying with the situation.

It is to be noted that the language used by the statute makes no provision for taking into account a person's intent or loyalty to the United States. It is also to be noted that, by the terms of the legislation, some of the acts listed do not necessarily in and of themselves serve as the basis for a strong inference that the person committing such acts is disloyal in the sense that he wishes to give up his citizenship and avoid all its duties. Other acts listed are recognized as crimes for which the punishment of imprisonment is already provided.

In reading over the category of acts which result automatically in loss of citizenship, one wonders why such things are not included as income tax evasion, investing money abroad, smuggling fire arms or untaxed liquor, and a hundred other things.

This legislation raises the very serious question whether it is within the power of Congress to divest a citizen of his status.

> Below the surface, the real issue constantly overlooked is whether Congress has the unilateral power to take away citizenship granted native-born by the Constitution itself. If is has not, may it find voluntary renunciation by reading into the doing of such colorless acts as it may specify, today or tomorrow, a really nonexistent intent or consent to forfeit a birthright? In brief, absent the factor of consent of both sovereign and the individual, is not native citizenship indestructible? If so, should not Congress confine itself to punishing citizens for treason and lesser crimes?[17]

And,

> To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power.[18]

III. Validity of Statutory Denationalization

The history of Congressional provision for loss of nationality progresses from voluntary expatriation to loss of citizenship as a result of some act which may or may not have been done with any idea of losing citizenship,

---

[17] McLaughlin, C. J., in Terada v. Dulles, 121 F. Supp. 6, 7 (D. Hawaii 1954).

[18] Rutledge and Murphy, JJ., concurring, in Klapprott v. United States, 335 U.S. 601, 616 (1949).

and which may or may not in itself be a crime. Many of the acts proclaimed by the statutes to result in loss of citizenship apply to natural born and naturalized citizens alike. Probably the initial motive which led Congress to provide for the loss of citizenship was the desire to avoid difficulties with other nations. But where natural born citizens are declared to lose their citizenship because of desertion from the armed forces or for violating the Smith Act, it is improbable that such desertion or violation of the Smith Act would involve this nation in international difficulties; and consequently the only purpose Congress could have had in mind in enacting such provisions was to impose additional punishment on the offender. It may be conceded that withdrawal of the right to stay in the United States is an effective sanction to punish draft dodging, desertion, subversion, or even tax evasion and many other things.[19] But the important question still remains. Does the Congress have the power to take away citizenship for any reason whatsoever?

A. The Doctrine of Sovereign Power.

It has been assumed by some authors that the power of Congress to take away citizenship is inherent in the sovereignty of the United States.[20] The Supreme Court of

[19] While Congress has yielded to the request by the executive branch for laws which would be more convenient to administer and which would eliminate the difficulty of deciding whether a particular person had expatriated himself, Congres has not, it seems, considered the disposition of those persons, natural born or naturalized citizens, who are divested of their citizenship but have no place to go or to be deported to because no other country will receive them. See Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

[20] Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25, 27 (1950); Flournoy, *Revision of Nationality Laws of the United States*, 34 Am. J. Int. Law 36, 44 (1940).

the United States has dealt directly with the question but once. In *MacKenzie* v. *Hare*,[21] a woman citizen of the United States, having married an English national, was held to have lost her citizenship under the Act of March 2, 1907[22] which provided that ". . . any American woman who marries a foreigner shall take the nationality of her husband." It was not shown that Mrs. MacKenzie was aware of the effect of her marriage or that she had any intention to give up her citizenship. Indeed, both she and her husband continued to live in the United States, and when she presented herself for registration as a voter in California she was turned away as being ineligible because she had become an alien. She contended that Congress could not impose loss of citizenship upon her because of her marriage to a foreigner. Affirming her loss of citizenship, the Supreme Court explained:

> As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.[23]

This is strange language. While it includes a dictum asserting a sovereign power to alienate the citizen, it pro-

[21] 239 U.S. 299 (1915).

[22] c. 2534, 34 STAT. 1228 (repealed by 54 STAT. 1172 (1940)).

[23] 239 U.S. at 311.

ceeds to disavow the dictum as the reason for the decision, concedes that citizenship cannot be taken away without concurrence of the citizen, and finds that Mrs. MacKenzie, in her voluntarily marrying a foreigner, voluntarily renounced her citizenship. The latter aspect of the case will be dealt with later. Suffice it to say, for now, that the case is not authority beyond the value of the dictum for the proposition that Congress has an unbridled sovereign power to take away one's citizenship as a means of dealing with international affairs. The authority of the dictum is nullified by the contradiction involved in the concession ". . . that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen."

The only other case in which a federal court has assumed a sovereign power in Congress to deprive a person of citizenship is *Ex parte Griffin*.[24] The petitioner Griffin went to Canada with his family and there enlisted in the Canadian army, taking an oath of allegiance to the King. Weeks later he tired of the life and returned to the United States where he was taken into custody as an alien. The government invoked the Act of March 2, 1907,[25] claiming that the petitioner had lost his citizenship as a result of taking the oath. The Court held the petitioner to have lost his citizenship and, citing *MacKenzie*, said:

> [T]he sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship. . . . There is no express grant of such power to Congress found in our Constitution. But there are powers implied necessary to the exercise of a government or a nation—necessary to the exercise of sovereignty. This is one.[26]

[24] 237 Fed. 445 (N.D. N.Y. 1916).

[25] c. 2534, 34 Stat. 1228 (repealed by 54 Stat. 1172 (1940)).

[26] 237 Fed. at 453.

This decision has nothing but the questionable dictum of the Supreme Court in the *MacKenzie* case to support it, but it should be noted in passing that the result is probably right and could have been reached, without straining for an implied power, on a finding of fact that what the petitioner did evidenced his desire voluntarily to leave the United States behind and take up citizenship and allegiance in Canada—that he had voluntarily expatriated himself.

One other case decided by the District Court for the Western District of Washington, *Ex parte (Ng) Fung Sing*,[27] should probably be included here because of a bare suggestion that sovereignty might be sufficient basis for involuntary loss of citizenship. A woman of Chinese descent was born in the United States. She was taken to China at a tender age, married a Chinese alien there, and sought to return to the United States at the age of 27. The same provision of the Act of March 2, 1907 which was involved in *MacKenzie* was invoked as the basis for her loss of citizenship. The court, holding that (Ng) Fung Sing had lost her citizenship, reasoned that "citizenship is a political status, and may be defined and the privilege limited by Congress. The Congress has, no doubt, power to say what act shall expatriate a citizen and forfeit right to 'protection abroad'."[28]

The validity of statutory withdrawal of citizenship has been upheld in three other cases whose authority is not persuasive. The first, involving voting in a local primary election in Mexico by a person who had citizenship of both Mexico and the United States, held that the provisions of the Nationality Act of 1940 ". . . bind the courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."[29] But no argument

[27] 6 F.2d 670 (W.D. Wash. 1925).

[28] *Ibid.*

[29] Miranda v. Clark, 180 F.2d 257, 259 (9th Cir. 1950).

was made or cases cited which established constitutionality so firmly. The second case held (apparently without the issue having been raised or argued) that "the statute which lists these acts[30] is constitutional,"[31] citing the preceding case as authority for the proposition. The case was reversed by the Supreme Court in a Per Curiam decision,[32] ruling that the standards of proof in expatriation cases are the same as in denaturalization cases[33] and that the standards had not been met. No opinion was expressed on the question of constitutionality. The third case which might be cited as authority for the validity of statutory extinguishment of citizenship as a result of doing some of the acts listed in the Nationality Act of 1940—in this case remaining outside the United States to avoid military duty—was summarily disposed of in the following words: "Appellant says that Section 801(j) was unconstitutional. However, we have held that it was constitutional, and we now reaffirm that holding."[34]

These are the only authorities supporting the proposition that Congress can take away citizenship. They are not persuasive. The argument, if any, in these cases is that somewhere in the Constitution of the United States the Congress is vested with powers inherent in sovereignty which are sufficient to support severance of the nation-citizen relationship.

The doctrine that Congress possesses sovereign powers such as that claimed in the foregoing cases overlooks both

---

[30] The acts specified in the Nationality Act of 1940 as expatriating—in this case staying in Mexico to avoid military duty.

[31] Gonzales v. Landon, 215 F.2d 955, 957 (9th Cir. 1954).

[32] Gonzales v. Landon, 350 U.S. 920 (1955).

[33] For instance, in Baumgartner v. United States, 322 U.S. 665, 670 (1944), the Supreme Court required that the evidence of fraud by one who is alleged to have taken the naturalization oath with mental reservations be "clear, unequivocal, and convincing."

[34] Vidales v. Brownell, 217 F.2d 136, 138 (9th Cir. 1954).

our Constitutional history and the express language of the Constitution itself: "All legislative Powers herein granted shall be vested in a Congress of the United States, . . . "[35] and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[36]

That the sovereignty of the people of the United States is vested in the people and not in the national government except to the extent provided for in the Constitution is a proposition so fundamental and accepted that it surely needs no citation in its support. Is it conceivable that the people of the United States; so cautious about creating a general government that a Bill of Rights was necessary before adoption of the Constitution could be secured, knowingly created a government which could rob them of all the blessings of liberty which many of them came to America to secure and which the Bill of Rights was calculated to insure—rob them by the simple device of declaring them to be aliens because they had married a foreigner, committed a crime, or performed some other act in good faith such as staying in a foreign country to take care of ill relatives or business interests beyond the period of time fixed by law for their return? Is it conceivable that the people, who accepted the Constitution reluctantly at best, recognized that in the general government to which specific powers had been given there was a lurking sovereignty with power to cast the creators of the government out?

If such was the mind of the people at the time they adopted the Constitution, if such was the mind of the framers, then why was it necessary to grant Congress the power to enact naturalization laws? For if there was to be an undefined sovereign power in the Congress to take away citizenship, certainly there would also be an equivalent

[35] U.S. Const. art. I, § 1.

[36] U.S. Const. amend. X.

power to grant it. If the general government is clothed with powers not expressed "because it has the character of nationality," why was it necessary to make specific provision for declaring war or making treaties?

The doctrine of sovereign or inherent power was soundly repudiated by the Supreme Court in *Kansas* v. *Colorado*.[37] Said the Court:

> But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things.[38]

The doctrine has, however, found support in the matter of exclusion and regulation of aliens. In *Fong Yue Ting* v. *United States*,[39] the Supreme Court upheld a statute providing for deportation of any Chinese laborer who did not procure a certificate of registration. The Court based its judgment solely upon an inherent sovereign power in the Congress to do all things necessary for the exclusion or regulation of aliens within our borders. Support for the doctrine may also be found in *United States* v. *Curtiss-Wright Export Corp.*,[40] wherein the Court sustained presidential regulation, pursuant to resolution of Congress, of the shipment of arms to foreign countries engaged in conflict. The Court expressed the opinion that:

> It results that the investment of the federal government with the powers of external sovereignty did not

[37] 206 U.S. 46 (1907).

[38] *Id.* at 89.

[39] 149 U.S. 698 (1893). *Accord*, cases cited note 8, *supra*.

[40] 299 U.S. 304 (1936).

> depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality.[41]

It plainly appears that the doctrine of delegated powers that the Congress can exercise only those powers granted it and none other—and the doctrine of sovereign power are at war with one another.[42] What the resolution of the conflict will be with respect to Congressional authority to deprive a person of his citizenship remains to be seen. In *Curtiss-Wright* the Court spoke of sovereign power over external affairs. Are shipping arms to foreign warring nations and regulating aliens within our borders, as external affairs, distinguishable from the division of water between Colorado and Kansas, as an internal or domestic matter? If there is such a distinction, to which class—external or domestic—belongs the loss of citizenship? There is still time for the Court to repudiate the doctrine of sovereign power as it applies to loss of citizenship. *MacKenzie* v. *Hare*,[43] as indicated earlier, did not decide the question on that ground, but rather on the ground that Mrs. MacKenzie had voluntarily given up her citizenship by voluntarily marrying a foreigner. It is submitted that if the doctrine gains acceptance in the matter of loss of citizenship, then the Constitution may be suspended for any minority class by converting such class into a group of aliens by the force of law and shipping them off to some place provided for that purpose.

---

[41] *Id.* at 318.

[42] The controversy is not limited to the cases. See book reviews of CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, Sharp, 54 COLUM. L. REV. 439 (1954), Durham, 41 CALIF. L. REV. 209 (1953), and Stern, 49 NW. U. L. REV. 107 (1954).

[43] 239 U.S. 299 (1915).

B. The Doctrine of Voluntary Expatriation.

It has long been established that the citizen can by his own choice and volition give up his citizenship, renounce his allegiance to the United States, and assume allegiance to some other nation.[14] Whether a citizen has done so or not is a question of fact to be established by what he intended to do as shown by what he has said and done.[15] The government has frequently urged upon the courts the proposition that Congress has the power to declare what acts, when voluntarily done, shall constitute voluntary expatriation. *MacKenzie* v. *Hare*[16] is a good example. It will be recalled that Mrs. MacKenzie had voluntarily married a foreigner and had therefore voluntarily expatriated herself, under the statute[17] providing that any American woman who should marry a foreigner should take the nationality of her husband. The Supreme Court's latest and most cited decision applying the proposition is *Savorgnan* v. *United States*.[18] The petitioner, American born, desired to marry an Italian Vice Consul. By Italian law, the Vice Consul could marry only Italian citizens. After a period of hesitation, she signed a formal document applying for Italian citizenship, signed an oath of allegiance and renounced American citizenship. All documents were in the Italian language, but she knew their import. The trial court made specific findings of fact that while she intended to acquire Italian citizenship she had ". . . no intention of

[14] See Slaymaker, *Right of the American Citizen to Expatriate*, XXXVII Am. L. Rev. 191 (1903).

[15] There are no decisions squarely in point on the facts. On the law, *cf.* Tot v. United States, 319 U.S. 463 (1943); Morrison v. California, 291 U.S. 82 (1934); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Bailey v. Alabama, 219 U.S. 219 (1911).

[16] 239 U.S. 299 (1915).

[17] Act of March 2, 1907, c. 2534, 34 Stat. 1228 (repealed by 54 Stat. 1172 (1940)).

[18] 338 U.S. 491 (1950).

endangering her American citizenship or of renouncing her allegiance to the United States." She went to Italy for a few years and then sought to return to the United States as a citizen but was turned back. The government invoked Sec. 401 (a) and (b) of the Nationality Act of 1940[49] against her, which provided that a citizen would lose his nationality upon obtaining naturalization in a foreign country or taking an oath of allegiance to another sovereign. The petitioner contended that she did not intend to give up her American citizenship and that her intent should prevail. The Supreme Court, in holding that she had expatriated herself under the act, said, "there is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them," adding that "whatever the legal consequences of those acts may be, she is bound by them."[50] Here again is the idea that when one voluntarily performs an act which Congress says is expatriating, the person is expatriated whether he intended to give up his citizenship or not. One cannot have too much sympathy for the petitioner, since she did all that anyone would require in the way of evidence showing an intent to expatriate. It seems likely in this case that the Supreme Court felt the good lady had really intended to do just what she did, since she knowingly signed the request for naturalization and the oath of allegiance to Italy, but that the Court felt bound by the specific finding of fact by the District Court that ". . . she had no intention of endangering her American citizenship or of renouncing her allegiance." What she did as established by the other evidence in the case seemed so clearly indicative of an intent to divest herself of American citizenship and take up that of Italy that the result—expatriation—seemed inescapable, despite her expressed state of mind to the contrary. As it turned out, *Savorgnan*

[49] 54 STAT. 1137 (later amended by 8 U.S.C. 1401-1503 (1952)).

[50] 338 U.S. at 499, 502.

merely interpreted the statute and did not as much as notice the lurking question of Congressional power. It does not appear that the issue was ever raised.

It is impossible to reconcile the decisions of the lower federal tribunals interpreting and applying the various provisions of the Nationality Act of 1940. They number in the hundreds. A substantial majority of the cases hold that the persons involved were not expatriated under the act. Most of the cases reaching this result do so on the grounds that the act—voting in a foreign political election,[1] serving in a foreign army or taking an oath of allegiance to a foreign government,[2] staying beyond the statutory period specified for return to this country by persons formerly of another nationality[3]—must be voluntary to effect expatriation.[4] Hardly any of the cases consider the distinction as to whether the citizen simply did the act voluntarily,[5] or

[1] *E.g.*, Nakashima v. Acheson, 98 F. Supp. 11 (S.D. Cal. 1951); Kuwabara v. Acheson, 96 F. Supp. 38 (S.D. Cal. 1951); Onye v. Acheson, 91 F. Supp. 129 (D. Hawaii 1950).

[2] *E.g.*, Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953); Dos Reis *ex rel.* Camara v. Nicolls, 161 F.2d 860 (1st Cir. 1947); Riccio v. Dulles, 116 F. Supp. 680 (D. D.C. 1953); Murata v. Acheson, 99 F. Supp. 591 (D. Hawaii 1951); Okimura v. Acheson, 99 F. Supp. 587 (D. Hawaii 1951); Kato v. Acheson, 94 F. Supp. 415 (S.D. Cal. 1950).

[3] *E.g.*, Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953).

[4] The legislative history of the Nationality Act of 1940 would indicate that when Congress provided for loss of citizenship as a result of voting in a foreign election, serving in a foreign army, etc., that it meant voluntarily doing so. Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953); Dos Reis *ex rel.* Camara v. Nicolls, 161 F.2d 860 (1st Cir. 1947).

[5] For the most part the trial courts have been indulgent in finding duress or coercion, in order to avoid a judgment that a party had lost his citizenship, even where the pressure or influence was slight. See Note, "*Voluntary*": *A Concept in Expatriation Law*, 54 Colum. L. Rev. 932 (1954).

whether he voluntarily gave up his citizenship *as evidenced* by the voluntary and knowing doing of the act.

The major problem raised by cases like *MacKenzie* v. *Hare* and *Savorgnan* v. *United States* is whether the Congress can constitutionally make the doing of an act such as voting in a foreign political election or marrying a foreigner conclusive of the question of expatriation. For if the Congress does not have the power to provide for loss of citizenship, it cannot indirectly achieve that end by making the doing of an act which may or may not have a relationship to voluntary expatriation conclusive proof of the latter. A number of courts deciding cases brought under the Nationality Act of 1940 have been conscious that the question was present.

The District Court for Hawaii, McLaughlin, J., has specifically raised the question in a series of cases. In the first,[56] the court held a native born citizen not to have expatriated herself when she voted in a Japanese election in 1946, not knowing about the provisions of the Nationality Act of 1940 imposing loss of citizenship from voting in such elections, and voting because she had been led by army authorities to believe that it was the thing to do and for the further reason that her family urged her to vote for fear that she would lose her rice ration card if she didn't. The court found that the citizen's voting was not the result of free and independent choice, nor the result of her free and voluntary act, and expressed the view that "the benefits of citizenship can be renounced, lost or waived only as the result of free and intelligent choice."[57] In a second case, *Okimura* v. *Acheson*,[58] the same court held that serving in the Japanese army and voting in the post war election of 1946 did not cause the loss of citizenship under the

[56] Onye v. Acheson, 97 F. Supp. 129 (D. Hawaii 1950).

[57] *Id.* at 131.

[58] 99 F. Supp. 587 (D. Hawaii 1951).

Nationality Act of 1940. The person involved had dual citizenship—that of the United States by virtue of birth in Hawaii, and that of Japan by virtue of birth to Japanese nationals. Judge McLaughlin wrote: "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese army or voted in an election in Japan?"[59] The court then declared the Nationality Act of 1940 unconstitutional insofar as it purported to take away citizenship for doing the acts and nothing more. The Supreme Court vacated the judgment and remanded the case to the District Court with the cryptic direction: "... for specific findings as to the circumstances attending appellee's services in the Japanese army and voting in the Japanese elections, and the reasonable inferences to be drawn therefrom."[60] The purpose which such findings would serve was not indicated. Did the direction to the District Court to make reasonable inferences from the circumstances of the service and voting mean that expatriation would follow automatically if the service and voting were voluntary; or did the Supreme Court mean that expatriation would result only if the circumstances attending the service and voting evidenced an intent to give up United States citizenship? Whatever the real purpose in the guarded language of the Supreme Court, the District Court on reconsideration of the case found that the army service was coerced, not voluntary, but that there was no evidence that the voting was done under legal coercion or duress. The court then ruled[61] that the service, being involuntary, was not expatriating, and that there was no expatriation from voting because the Act of 1940, providing for loss of

[59] *Id.* at 589.

[60] Acheson v. Okimura, 342 U.S. 899 (1952).

[61] Okimura v. Acheson, 111 F. Supp. 303 (D. Hawaii 1953).

citizenship from voting, without more, was unconstitutional. In a third and later case,[62] on facts almost identical with those of *Okimura*, the same court raised the question of Congressional power in the pointed words quoted above at page 66. The court followed its earlier ruling that Congress does not have power to take away citizenship indirectly by making an overt act conclusive of expatriating intent in the absence of a showing that the act establishes the intent.

It appears that the District Court was well advised in holding that proof of voting in a Japanese election by a person who was a citizen of both the United States and Japan could not be taken as conclusive proof of an intent to forfeit citizenship. As a procedural device, the presumption of expatriation arising from voting or from long residence in another country, desertion from the armed forces, marrying a foreigner, or what have you is valid only if there is a rational connection between the fact proven and the fact to be presumed; and if the presumption is not applied in such a way as to preclude the person against whom it runs from making his defenses. The cases make it crystal clear that a court or jury cannot be compelled to conclude that a person has voluntarily renounced his citizenship upon proof only that the person voted in a foreign election, held a public office in another country, or stayed away from the United States beyond a period fixed by statute.[63] To do so is to deprive the person of liberty without due process of law. If the deprivation of citizen

[62] Terada v. Dulles, 121 F. Supp. 6 (D. Hawaii 1954).

[63] *Cf.* Tot v. United States, 319 U.S. 463 (1943); N.Y. Life Ins. Co. v. Gamer, 303 U.S. 161 (1938); Morrison v. California, 291 U.S. 82 (1934); Western & Atl. R.R. v. Henderson, 279 U.S. 639 (1929); Manley v. Georgia, 279 U.S. 1 (1929); McFarland v. American Sugar Co., 241 U.S. 79 (1916); Luria v. United States, 231 U.S. 9 (1913); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Bailey v. Alabama, 219 U.S. 219 (1911); Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910).

ship as the result of doing certain acts is to be considered a matter of substance rather than procedure—that is, the voting, desertion, marrying a foreigner, living too long abroad, is prohibited and the penalty for violation is loss of citizenship—we are confronted again with the principal question of power of Congress, for if Congress cannot take away citizenship by legislative fiat directly, it cannot take citizenship away indirectly.[64]

In view of these principles, in addition to the principle pronounced in the *MacKenzie* case, that "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen,"[65] it seems that the *MacKenzie* case was wrongly decided. For if the Congress cannot take away the citizenship of a person without his concurrence, it cannot do so indirectly by making the performance of some other act such as marrying a foreigner conclusive proof of concurrence.

C. Effect of the Fourteenth Amendment.

Prior to the ratification of the Fourteenth Amendment to the Constitution, the only provision in that instrument having anything to do with acquisition of the status of citizenship was the power given to Congress "To establish an uniform Rule of Naturalization."[66] Congress has never attempted to expand this power into a power to denationalize.[67] Rather, Congress itself has interpreted this power

[64] *Cf.* Bailey v. Alabama, *supra* note 55.

[65] 239 U.S. at 311.

[66] U.S. Const. art. I, § 8.

[67] Denaturalization proceedings are predicated on failure of an applicant for naturalization to comply with all the conditions for acquiring naturalized citizenship, and in effect the judgment rests on a finding that citizenship was never really acquired. Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

to mean "the conferring of nationality of a state upon a person after birth, by any means whatsoever."[68] Perhaps the scope of the naturalization power was indelibly fixed by an early dictum of Chief Justice Marshall, speaking of the rights of citizens: "The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[69]

The Fourteenth Amendment fixes the definition of those who are to be citizens by declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

Those who would contend for a sovereign or inherent power in the Congress to make aliens out of citizens seem not to have considered the effect of the naturalization power and the Fourteenth Amendment. To admit that Congress can take away citizenship, taken together with the expressed power to grant citizenship by naturalization, renders the Fourteenth Amendment futile and surplusage. For then, citizens are not "All persons born or naturalized in the United States," but all persons born or naturalized in the United States from whom Congress has not withdrawn citizenship.[70] It is not easy to suppose that the Congress which proposed and the states which ratified the Amendment intended to do a futile thing. Furthermore, if it had been the intention of the framers to allow the

[68] 66 Stat. 166 (1952), 8 U.S.C. § 1101 (1952).

[69] Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

[70] The logic of the proposition is no less compelling that prior to the ratification of the Fourteenth Amendment all white persons, at least, born within the jurisdiction of the United States, excepting only children of ambassadors or public ministers of a foreign government, were native born citizens of the United States. See United States v. Wong Kim Ark, 169 U.S. 649 (1898).

status of citizens to be affected by the Congress, they knew how to employ language to achieve that purpose. There are numerous places where the Constitution fixes status, specifies qualifications or vests powers subject to modification by the Congress. For instance, it is declared in art. I, § 4, that "The times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." And in art. III, § 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." If it had been their intent to authorize Congress to restrict the qualifications of citizens, the framers knew how to do so. It is significant that they did not do so.

But the matter need not be left to general reasoning. The Supreme Court itself has clearly interpreted the Fourteenth Amendment as putting beyond the reach of Congress any power to modify the status of the citizen. In *United States* v. *Wong Kim Ark*,[71] the petitioner, born in the United States of Chinese parents in 1873, was excluded from the United States on return from a temporary visit to China in 1895, upon the government's sole ground that he was not a citizen of the United States. It was agreed by the government that if Wong Kim Ark was a citizen, " . . . the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."[72] While agreeing that the Chinese Exclusion Acts[73] would not operate to

[71] 169 U.S. 649 (1898).

[72] *Id.* at 653.

[73] 22 STAT. 58 (1882); 23 STAT. 115 (1884); 25 STAT. 476, 504 (1888); 27 STAT. 25 (1892); 28 STAT. 7, 390 (1894) (later repealed by 57 STAT. 600 (1943)).

keep Wong Kim Ark out if he were a citizen, the government contended that he was not a citizen despite his birth in the United States because Congress had not, by any of the statutes defining those who might be naturalized, made persons born to Chinese parents eligible for citizenship. While the Supreme Court defined the question to be decided in narrow terms ("The question presented by the record is whether a child born in the United States, of parents of Chinese descent . . . becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution. . . . ")[74] it was necessary, in order to dispose of that question, to decide whether the exclusion of Chinese from citizenship under the naturalization acts or from entry into the country, because they were Chinese laborers, effectively stripped those persons of citizenship acquired by birth in the United States or prevented the acquisition of citizenship by such persons born in the United States. The language of the Court, considered by some to be a dictum, but really necessary for the decision of the case, seems so plain as to lay at rest for all time any contention that Congress can by law impair or alter the status of citizenship acquired by operation of the Constitution. It said:

> The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the Constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color.[75]

[74] 169 U.S. at 653.

[75] *Id.* at 6.

And further:

> The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . Congress, having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.[76]

It must be noted in passing that the Supreme Court, in holding that Congress could not impair or abridge citizenship, recognized the existence of an undefined sovereign power to exclude or expel aliens.[77] It would seem that *Wong Kim Ark*, at least as respects citizens and aliens, settles the controversy between the exponents of a sovereign power in Congress and the exponents of limited government (see p. 72 [p. 16a] *supra*).

It is a little surprising that the question of the power of Congress should have been raised in so few of the cases. An exception is *Terrida v. Dulles*[78] in which the question was squarely presented whether the Nationality Act of 1940 as amended, decreeing loss of citizenship of one who voluntarily voted in a foreign political election, was within the power of Congress. In his carefully considered opinion, Judge McLaughlin applied *Wong Kim Ark*, holding that the Congress had no such power as that asserted and re-

[76] *Id.* at 703.

[77] *Id.* at 699.

[78] 121 F. Supp. 6 (D. Hawaii 1954).

jecting both the doctrine that Congress had a sovereign power to deprive one of citizenship and the doctrine that Terada had, by voluntarily voting, conclusively expatriated himself.

IV. Conclusions

Citizenship in the United States, a status of inestimable value, is looked upon by some as a cloak which can be stripped from a person by force of Congressional legislation, leaving the person an alien, subject to deportation or exclusion from the United States. The idea has become a serious threat to personal liberty and if accepted can become the instrument by which whole classes of people may be exorcised from the society. Congress has already taken the first steps by enacting legislation declaring that the doing of certain acts, some of which do not even remotely suggest that intent to expatriate was present in the doer, will result in loss of citizenship.

The claim for such a power in Congress was given the breath of life by a dictum in *MacKenzie v. Hare* wherein the Supreme Court seemed inclined to extend the powers of Congress by asserting for the national legislature a sovereign or inherent power, not expressed, to determine what acts performed by a citizen would result in loss of citizenship. But the force of the dictum was spent in the very case in which it was announced when the Court declared that loss of citizenship could be effected only by concurrence of the citizen. The doctrine of sovereign power in Congress to take away citizenship, equal to the sovereign power in Congress to expel or exclude aliens, seems to have been definitely repudiated by *Wong Kim Ark*.

Choosing not to rely upon a sovereign power in Congress to deprive of citizenship, the Supreme Court in *MacKenzie* did hold that voluntarily doing an act specified by Congress—marrying a foreigner—was the cause of automatic loss of citizenship. Indeed, the Court must have concluded

that Mrs. MacKenzie had voluntarily and knowingly given up her citizenship, because the Court said that she could not be deprived of citizenship without her concurrence. But the plain facts of the case indicate that she was unaware of the effect of her marriage to a foreigner, and nothing in the case as much as faintly suggests that she concurred in loss of her citizenship. Indeed, her conduct would indicate that she intended to stay in this country and act like a citizen, including participating in the election process. In so finding, the Court treated the statutory loss of citizenship from marrying a foreigner as a presumption—indeed, as a conclusive presumption. It should be noted that the case was not remanded to the trial court for a finding on the question of Mrs. MacKenzie's concurrence. Concurrence was held as a matter of law to flow from a finding that she had married a foreigner. In numerous other cases in which the validity of presumptions received adverse consideration the Court has labelled unconstitutional statutes creating arbitrary presumptions or presumptions which precluded a person from presenting his defenses. In *MacKenzie*, the Court effectively deprived the petitioner from rebutting the fact of concurrence. The decision runs counter to the firmly established rule, and it does not seem likely that the Court will repeat the error in a case in which the Court is fully advised.

The Constitution itself, without importing into it doctrines contrary to the very philosophy of the document, affords no basis whatever for a power in Congress to take away a person's citizenship. Rather, the Constitution unequivocally says who are citizens. While it conspicuously gives Congress power to confer citizenship by naturalization, it just as conspicuously omits any specification of a power to alter or take away the status of citizenship. The Supreme Court, in *Wong Kim Ark*, in a pronouncement considered in some quarters as dictum, but which was actually given full consideration and actually necessary for the decision of the issues as presented, squarely rejected

the power claimed for the Congress to withdraw citizenship conferred upon a person by the Constitution.

We must conclude that he is bold indeed who, on a careful analysis of the cases, labels as an irresponsible adventurer one who would deny to the Congress a power to take away the most valued right that any person can claim, his citizenship.